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IN THE

Supreme Court of the United States

LEROY HILL, JR.,

Petitioner,

v.

EMORY UNIVERSITY, EMORY HEALTHCARE, INC. d/b/a, EMORY WINSHIP CANCER INSTITUTE, DEDRA F. CANTRELL a/k/a DEDRA FRUTCHEY, and SANDRA MURDOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two questions are presented:

(1). Under what circumstances, if any, in the context of a one-man reduction in force ("mini-RIF") may a Plaintiff establish the existence of invidious discrimination in employment by adducing evidence that the terminated employee's duties were absorbed by other employees, rather than eliminated from the company altogether, amid circumstances that suggest unlawful discrimination?

(2). Because this Court has held that "In determining whether actionable hostile work environment exists, we look to 'all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S. Ct. 2061, 2074, 153 L. Ed. 2d 106, 124 (2002)", what is the requisite quantum of proof a plaintiff must adduce in order to sustain a claim of actionable hostile work environment?

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U.S. SUPREME COURT RULES:

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Rules for the Supreme Court 1

Petitioner, Leroy Hill, Jr. ("Hill") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case on August 25, 2009.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Georgia, in which it granted summary judgment against Petitioner Hill, is unreported, and is reproduced in the Appendix to this Petition ("App.") at 15a to 47a. The Per Curiam opinion of the Eleventh circuit whose review is sought is reproduced in the Appendix at 1a to 14a.

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court. The Per Curiam opinion of the eleventh circuit court of appeals was entered on August 25, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1). The present Petition for Writ of Certiorari is filed within Ninety (90) days of the Opinion of the court of appeals affirming the Order of the district court below, and is timely pursuant to 28 U.S.C. § 2101(c) and Rules 10(1)(a) & (c) of the Rules for the Supreme Court.

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of the 42 United States Code provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts . . . as is enjoyed by white citizens . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

STATEMENT OF THE CASE

1. FACTUAL BACKGROUND

Leroy Hill ("Hill"), is a Black citizen of the United States. He was initially hired by Emory Healthcare, Inc. ("EHC") on February 9, 1998 as the Director of Data Services and Decisions Support ("Data Services"), and directly reported to the Executive Director of Applications Services of the EHC Information Services ("EHC-IS"), Dedra Frutchey Cantrell ("Cantrell"), white female, who herself reported to the Chief Information Officer ("CIO"), Ron Palmich ("Palmich"), white male. The Director of Data Services position was a full-time, regular position. Prior to being recruited by EHC-IS, Hill possessed extensive experience base in Information Technology. All of the other Directors at this time were Caucasians, and included: Jack Morford; Katherine Casey; Rick Aaron; Tim McCrary; John Mason; Terry Willey; Malcolm Barnes; Joe Medley (Manager of Systems Support). The Clinical Applications (directed by Willey and Beck), Data Services (Hill), Business Applications (Barnes), and Systems Support (Medley) were all a part of the Application Services, and the directors all reported directly to Cantrell. Hill directed the development and deployment of Data warehousing and technology solutions to support patient care, teaching and research, and led a staff of about fifteen (15).[1] Hill

1. Data warehousing is an architecture, and a central repository which goal is to take typical day to day transactional information, put it into a common database, common repository, and allow the users to ask and receive answers of that data across the population of data, with the biggest difference from transactional applications being that in transactional applications, one looks at one person at a time while in Data warehousing one looks at populations at a time.

performed excellently in his position in 1998 and 1999, and often took over other directors' assigned tasks when they were unable to execute.[2] Hill also received excellent performance reviews in 2000 and 2001, and received high praises from his departmental "peers".[3] Hill's Data

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2. Hill successfully implemented a TSI application implementation after another Director failed to competently install same, within budget and on schedule; received Best ROI award in 1999 for identification of $1.5 million of unpaid reimbursements., among other accomplishments, and transformed low-use Data Warehouse to mission critical application within 2 years.

3. On August 10, 1998, Mr. Hill received his first 6 month performance evaluation, and received high praises from his departmental "peers" who contributed to the evaluation. The first peer specifically mentioned that "[L]eroy listens well, is a calming force, is proactive, and he wants to do the right thing." The second peer statement provided very favorable comment on Hill's technical knowledge and ability to share/apply his experiences. The third peer comment again emphasized that "Leroy has been good to work with - he actually listens to what you are saying and tries to accommodate all sides of the issue. . . ." On April 5, 1999, Hill received his first annual performance review as Data service Director, and was rated very highly (4 out of 5) in each and every review category by Cantrell., who stated in the comments section of the performance evaluation as follows: "Leroy brought a wealth of knowledge to the data services work group. He takes the time to teach and mentor his staff. He works well w/Directors and our clients. He maintains a positive attitude & is always professional in his approach. . . ." With respect to communications evaluation category, Cantrell noted in her own handwriting about Hill "[c]lear in communications, *listens*, does a great job @ keeping me informed." On July 20, 2000, Hill received another performance review for the period 1/01/00 - 7/31/2000, and was rated as "Meets Expectations" in all evaluation categories. On July 13, 2001, Hill received his performance review as Manager of Data Applications

(Cont'd)

Services workgroup was consistently the least staffed, with typically 25 projects and only 13-15 employees to perform the work. Invariably, the Data Service data administration team inherited by Hill was poorly-trained and skilled, with only 2 employees with sufficient skills to run technical projects with minimal supervision in terms of project design and analysis. Nina Gangadharan was the least experienced, and skilled. Despite his accomplishments, within a few months after his hire, Cantrell and Palmich, subjected Plaintiff to relentless disparate and dissimilar standards in the terms and conditions of his employment relative to other similarly-situated white managers.

On January 25, 2000, Douglas, informed Hill that he desired to transfer out of the EHC-IS to another department within EHC.[4] As his reason for requesting

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(Cont'd)

for the period 7/00 - 7/01, and was again rated as "Meets Expectations" in all evaluation categories, and there was no adverse rating regarding Hill's performance and skills with respect to Customer Service, Communication, Leadership, Employee relations, Teamwork, Initiative, Job Knowledge, Attendance and Work Routine, Project Management, and/or Listening skills.

4. Douglas, was a white male Data Administrator under Hill's supervision, who was an average performer as an employee, and although, he met the performance requirements of his position, he was neither a top performer nor a critical or indispensable member of the Data Service team. Douglas constantly challenged Hill's project management style, resented Hill's criticisms and supervision, and resisted cross training other Data Services less skilled staff in accordance with Palmich's espoused "cross-pollination" or cross-training philosophy.

a transfer, Douglas stated that; he desired to be closer to healthcare operations, closer user contact; wanted to be involved in full application development; and lack of new technical challenges in his current position. Douglas also complained that there was not enough people with sufficient skills to deliver on the excessive commitments by Data services, and the fact that he was required to perform both development and production support. Douglas and Cantrell also confirmed the completeness of Hill's summary. After meeting with Douglas on 1/25/2000 about the foregoing, Hill informed Cantrell and Palmich on the same day. Palmich and Cantrell were very upset by the news that Douglas desired to transfer out. On 1/26/2000, Palmich and Cantrell, in an unusual move that had never happened in the department during Hill's tenure, invited Douglas and Hill to a meeting to discuss the reasons for Douglas' transfer request, and during the meeting, Douglas repeated his above-stated concerns including the under-staffing issues to Cantrell and Palmich. Cantrell and Palmich instructed Hill to include 2 FTE allocations requests in his fiscal year 2001 budget request to help ease the staff problem, however, after Hill requested the 2 FTE's in the budget request as instructed, Palmich and Cantrell turned down the request.

Cantrell and Palmich had the administrative authority to approve and/or strike requested additional 2 FTE's within or outside the budget, and did not hesitate to exercise that authority regularly. One week later, Cantrell met with Douglas and demanded to know his "true reasons" for resigning, and Douglas repeated his previous reasons and also added that the problem was primarily "over commitment" on projects by Data

services. Other than the reasons identified above, and as summarized in Hill's summary, Douglas did not provide any other reasons to Cantrell as the cause of his request for a transfer. Between February 1 and March 30, 2000, Cantrell embarked on a series of clandestine interviews, meetings, "pulse check" meetings with Data services employees in Hill's absence, and solicited complaints, criticisms, unflattering statements about Hill's project management skills, perceived dysfunction and chaos in Data services, secretly convened and/or attended meetings of Data services staff in Hill's absence seeking to elicit the foregoing types of information, but was unsuccessful. Also, between March 7 and 22, 2000, Cantrell issued series of threatening memos in which she accused Hill of leadership performance deficiencies, threatened him with termination, and ordered his entire staff investigated and subjected to psychological interviews and counseling by the Wellness Center ("Wellness Center" or "Wellhouse").

Between March 29, 2000 and April 7, 2000, Hill and his entire Data Services staff were interrogated by the Emory Well House staff, and Hill's personal habits, management style, communication, interaction with his staff, mannerisms, his project assignments philosophy were scrutinized, and his were pressured by the Wellness Center's staff to make criticisms and statements about his management skills. Yet, during the Wellhouse sessions or group meetings Data services staff, which Hill also attended, there was no discussion of the real causes of Douglas' transfer out of EHC-IS as stated by him during the interview meetings with him.

Significantly, many EHC-IS employees previously resigned, complained about their managers, and/or transferred out of other EHC-IS work groups, but no White directors/managers the staff had ever been investigated, intimidated, threatened with termination or had the employees interviewed or ordered to undergo psychological counseling or questioning sessions by Cantrell or Palmich in the entire history of the EHC-IS. Instead, it was the common practice for Directors and managers to informally announce any resignations or transfers from their respective work groups during the regular weekly management meetings.

On 3/22/2000, Hill lodged a complaint of discrimination and different treatment with Larry Hodges ("Hodges"), white male EHC-HR Director, against Cantrell and Palmich. In response, Hodges warned Hill that "it is typically a no-win for an employee to go against management," and never acted on Hill's complaint, and meanwhile, the discriminatory practices intensified. On May 2, 2000, Hill separately met with and reported the discriminatory Wellhouse referral, and other harassing conduct by Palmich and Cantrell to the Emory's University-wide Equal Opportunity Program ("EOP") administrator, Robert "Bob" Etheridge, and also returned to Hodges to update his March 22, 2000 complaint. Again, Etheridge listened to Hill's allegations but, failed to take any actions to address the issues, and Hill never heard from the EOP office, or Etheridge thereafter. On 5/4/2000, Hodges directed 2 separate memoranda to Palmich, Cantrell, and HR, in which he provided partial summaries of the substance of Hill's 3/22/2000 and 5/2/2000 complaints of discrimination. About 3 ½ weeks later on 5/30/2000, Hill met with Cantrell at

her request, for an off-site lunch meeting, and proposed that they each wipe the slate clean. However, at the same time, Cantrell transferred all of Hill's DBA direct reports away to Medley's supervision, and moved another staff to report to Barnes.

Accordingly, on 10/17/00, Hill filed another complaint of discriminatory treatment of Blacks and Black applicants to EHC-IS with Dana Bible of the EHC-HR in regard to the unfair interview process, hostile work environment, and the overall pervasive racial harassment in EHC-IS department. Specifically, Cantrell and Palmich established a dual-system disparate practice of requiring Black job applicants to be interviewed by no less than 10 -12 people from various EHC-IS workgroups, while the White candidates were only interviewed by 3-5 people; Cantrell repeatedly attempted to convert Hill's full-time positions to temp-to-full-time positions when it became apparent that Black persons were the top candidates. Hill complained that employees from other IS workgroups were allowed to interview job applicants for Data Services positions, while Hill was never designated to participate in interviews for whites, or candidates that applied to other workgroups than Data Services, and also complained about the hostile work environment that Blacks were subjected to at EHC-IS. Once again, on 11/1/2000, Hill was informed that his title had been changed, retroactive to July, 2000, to Manager of Application Services with the express approval of Hodges to whom Hill lodged 2 previous complaints of discrimination.

In late 2/2001, Palmich and Cantrell informed Hill that they negotiated a promotion and transfer for him to the Winship Cancer Institute ("WCI") of the Emory School of Medicine with its director, Dr. Jonathan Simons ("Simons"), and instructed him to post for the position. The posted advertisement for the DOI position did not disclose that the position was a temporary or charge back position, nor was Hill informed that the position was a temporary **"charge back,"** or different in in any way from Hill's full time, regular position at Data Services. Effective 3/9/2001, Hill was physically and administratively severed from Data Services, and his office was moved to the 2nd floor of the IS building with the IT security group.

As DOI, Hill provided primary leadership in the implementation and support of the multimillion-dollar bio-informatics system for cancer research and treatment known as Genesys SI ("GSI"). However, on May 6, 2001, Hill was alerted by a WCI project management staff, Patina Sidner (Black female) that his "promotion" to DOI was engineered by, and was a disguised ploy by Cantrell and Palmich to get rid of Hill from EHC-IS. Deeply concerned, Hill confronted Palmich and Cantrell with Sidner's claims, and they denied and reassured Hill that no such designs existed, and that his DOI position was a permanent, full-time position.

Murdock, as the WCI COO, directed the patient and family services, informatics, administration, decision support, billing and collection, oncology nursing, bone marrow transplant departments of WCI, and reported to Simons. At WCI, all of Hill's peers were white, had

director level positions, and all reported to Murdock. Between March, 2001 and end of 2003, Hill was the Project Lead/Manager of GSI development, yet, Murdock and Simons denied Hill any staff, whatsoever, although his peers had direct reports with much fewer number of projects than Hill.[5] On 12/11/2001, Murdock authorized Hill to fill a Business Analyst III ("BA III") position, and Hill selected a Black female candidate, Lillie Reid ("Reid") and made a verbal offer to Reid and after she accepted, Murdock rescinded the offer to Reid, removed the hiring decision from Hill, and instead, placed the position and hiring decision under a white IS Director, Willey, who offered the BA III position to a white female, Cindy Hubbard ("Hubbard"). Hubbard was hired as BA III, and reported to Willey/Murdock.

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5. At WCI, all of Hill's peers had director level positions, all reported to Murdock and included Elaine Koenig (White female, and Director of Patient Family Services), James McKay (White male, and Director of Decision Support services), Cheryl Martin (White female, and Director of Oncology Nursing), Debbie Hoaks (White female, and Director of Oncology Nursing for the Bone Marrow Transplant program), Ashley Boaz (White female, and Director of Administration), Vickie Miller (White female Director). Roz Robinson, Black Female, was the Director of and the tissue procurement was a part of nursing services of the hospital. Invariably, between March, 2001 and end of 2003, Hill was the Project Lead/Manager, and was assigned approximately 21 of the 25 on-going projects at WCI as reflected on the Functional Organization Chart of WCI.. Yet, Murdock and Simons denied Hill, and he did not have any direct reports or staff, whatsoever, although his peers had direct reports. McKay had 4 direct reports and about 8 projects; Martin was assigned 20 employees.

On 10/4/2002, the Alpha release of GSI was completed with Hill's leadership and on October 22, 2002, Hill was issued a glowing review by Cantrell, and received high ratings and lavish praises for his Leadership, Decision Making/Judgment, Employee Relations, Staff Development, Budget/Expense Control, etc. Yet, on 11/7/2002, Hill submitted a request for funding to attend a BRIITE conference which was relevant to the GSI project, and Murdock turned down his request, and Hill was forced to pay his own way to the conference, but, Murdock approved Hubbard's request for funding to attend a conference in California at the same time.

Two years after his presumed transfer to WCI Directorship position, Hill was still not assigned an office by Cantrell and Murdock, and worked out of a cubicle located at the EHC building. On 2/25/2003, Hill requested that Murdock provide him with office space at the WCI's new building ("Building C") that was about to be completed, and Murdock declined. The Building C was completed on July 4, 2003, and the entire white WCI's senior and Director-level staff, except Hill, were moved into private offices there.[6] On August, 4, 2003, Hill again requested to be moved to Building C or, even the older "B" building, but Murdock and Cantrell consistently denied his requests, and claimed there was no space available. On 10/10/2003, the Beta Release of

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6. The WCI Building C was completed on July 4, 2003, and the WCI's senior management and Director-level staff moved into private offices in the building, including Simons, Murdock, Koenig, McKay, Martin, Hoaks, Boaz, Miller, Bloomfield, all white persons.

GSI was implemented and the Final product was installed, and on 10/29/2003. Hill began to transition into GSI production support and maintenance phase. Hill complained to Simons about his continuing office space denial ordeal to no avail, such that 30 months after his transfer to WCI director position, Hill was still not assigned an office space at WCI. Hill contacted John Fox (EHC - CEO) and complained about Murdock and Cantrell's refusal to provide him with an office space at WCI, and on the next day, Cantrell assigned Hill office space in Building B, and on 01/27/2004, Hill moved into the office, but not in Building C where the other Directors were moved.

Murdock Hires Hubbard into WCI Organization, Moves her into Building B, Transfers all of Hubbards Projects to Hill and Initiates a Plan to Elevate her to Directorship Position and Replace Hill with Hubbard

On 6/8/04, Hubbard transferred to WCI as BA III charge back with Murdock's approval. Hubbard was previously assigned office space in Building B. On 8/1/2004, Murdock and Cantrell transferred all but One (1) of Hubbard's projects, valued under $100,000, to Hill in addition to Hill's assigned projects, because she could not efficiently execute her assigned projects. However, for Hubbard's one (1) project, Murdock approved 3 FTE's for Hubbard, but denied ANY FTE for Hill who had more than 15 projects valued over $2,300,000. After her move to WCI effective 6/2004 as a BA III, one of the Top Priorities assigned to Hubbard by Murdock was to Work with Murdock to develop a job description for classification as Director. On 2/3/2005, Murdock

requested that Hubbard's position be reclassified to Director level title from BA III, and confirmed that Hubbard had 10 employees reporting to her at that time. Effective, March 1, 2005, Murdock promoted Hubbard to Director of IT Operations. Hubbard was placed in an IT leadership position such that her job was comparable to Hill's, with 10 FTE's, while Hill was denied any FTE support, whatsoever..

On 6/7/2004, Hill submitted a Total Cost of Ownership proposal to Cantrell and Murdock for the GeneSys SI Enterprise Rollout (with hardware, software, implementation costs, FTEs.). In addition, Hill included in the package, a request for 5.4 new FTEs; 2 of the FTEs were for EHC-IS positions, and the other 3.4 resources were for my WCI Oncology Informatics area. Within three (3) days, Hill received from Cantrell, the GeneSys SI expansion net new costs for the GSI Enterprise Rollout, and the only FTEs approved in the budget were the 2 allocated to EHC-IS, while Hill's department, the Oncology Informatics department received ZERO (0) FTEs, and thus, Hill remained the only WCI Director and project manager with no FTEs or administrative support of any kind. Undeterred, on 6/29/2004, Hill submitted a budget proposal for Fiscal Year 2005 that included 2 FTE positions request for WCI Oncology Informatics as follows: 1 Data Entry Specialist, and 1 Information Analyst position. Again, Murdock, Cantrell and Simons struck Hill's request for 2 FTE's, and Hill remained the only WCI or EHC-IS Director that had absolutely no support staff.

On 2/25/2005, Dr. Rogatko (WCI Biostatistics Director), talked to Hill about assisting him with

recruiting and management of a new Database Analyst to work on a Biostatistics grant he obtained. Murdock stopped the effort claiming she had not approved it, yet, around this same time, Murdock promoted Cindy Hubbard to a Director position at WCI, and immediately moved her to the Building C to join other white WCI directors, and gave her 10 FTE direct reports. Shortly thereafter, Murdock and Cantrell demanded to have a mid-period or half-year performance checkpoint meeting with Hill, although, in the entire time that he was employed at WCI from March, 2001 until March, 2005, Hill's job performance had never been appraised mid-term by Murdock, Cantrell or anyone else, as he always received only annual review per 12 month period, nor was Hill previously informed of any policy change to mid-year reviews at WCI.

On 3/31/2005, Hill met with Cantrell and Murdock for the mid-year Performance Checkpoint, and during the meeting, Hill handed out his completed Employee Discussion Questionnaire, and sought to discuss the contents, however, Murdock showed absolutely no interest and went over to the white board with her back turned to Hill and Cantrell. At the end of Hill's presentation, Murdock interjected that she wanted to discuss other things, and proceeded to list all project items that were not completed (IS plan, StemSoft, Clinical Trial, NMDP and Tissue Bank). Hill immediately explained, and fully contradicted each assertion of project incompleteness made by Murdock, and showed that she either misunderstood or forgot previous 3rd party vendor actions that affected GSI project status.

During this meeting, Hill complained to Murdock and Cantrell that they were discriminating and treating him differently from his Director peers; that they were intentionally setting him up to fail by refusing him resources and then complaining about projects incompleteness and holding him to a much higher standard of performance than was being applied to his WCI peers, because all of them stated to him that they were never subjected to mid-year reviews by Murdock. On 4/6/2005, Hill submitted his status report to Murdock and Cantrell, and indicated therein that he had been appointed the Co-Director of Data Mgt. component of Biostat/Data Mgt. core by Dr. Andre Rogatko. Just as she did with Sidner, Murdock immediately sent Hill an e-mail accusing him of overstating his role in the project as co-director. Murdock then asked Dr. Rogatko to withdraw the appointment, and remove Hill's name as the Co-Director from the Grant documents, because Hill would not be at WCI much longer, and Rogatko complied. Dr. Rogatko and the Emory University CIO, Rehan Khan, both white males, separately informed Hill that the reason he was not getting resources and support for his projects was because of the color of his skin.

On 4/7/2005, Cantrell and Murdock requested to the EHC-HR that Mr. Hill's position be eliminated; they provided 2 reasons for their request as follows: **"(1) Genesys SI project is complete and in production support mode; and (2) Further Genesys SI expansion across EHC has not been funded."** They made no mention of WCI budget issues. In fact, in Fiscal Year 2003, Hill's salary was paid out of the School of Medicine's portion of the WCI Fund Budget100%, in the

amount of $119,018 (Account #280087). The evidence showed that the Woodruff Fund did not experience Salary deficit in that fiscal year. Similarly, the 2005 Fiscal Year Emory Clinic Operation Budget of the WCI showed net profit of $142,307 in that fiscal year. (August, 2004 to August, 2005). The 2005 Fiscal Year School of Medicine budget of the WCI showed Hill's salary of $121,982 was shared equally in that fiscal year between Woodruff Fund and Emory Healthcare IS Department in the equal amounts of $60,996, each, and not 100% paid by EHC-IS. Significantly, at the time of Hill's termination, the WCI budget Deficits account chart as of end of 2004 fiscal year did not include the Woodruff Fund. On the contrary, the Actual fiscal year 2005 budget of the School of Medicine component of WCI annual budget (Sept, 2004 - Sept. 2005) reflected a total expenses for the Woodruff Fund of $3,612,143, and expected Woodruff Fund income of $3,676,122, for a computed Net income of $63,979. Thus, Hill's entire annual salary of $121,922 was already taken into account in the budget and there still existed a surplus for that year. Similarly, WCI's Woodruff Fund's *Actual* Sources and Uses of Funds showed Total (Revenue) Sources in the amount of $3,355,068, and Total (Expenses) uses of funds in the amount of $2,986,869, amounting to a computed net Revenue in the amount of $368,199 that was left over in the account on September 27, 2005 shortly after Hill was already terminated on May 9, 2005. Importantly, in 2004 Fiscal Year, the Woodruff Fund experienced total *Actual* Revenue Sources in the amount of $5,391,454, and total Actual Expenditure Uses of $5,133,903, for a Net Revenue in the amount of $311,571. Thus, the Woodruff account was not running any deficits.

In fact, on 4/6/2005 date of the request to HR to eliminate Hill's position, neither Cantrell nor Murdock knew Hill's salary, and on 4/15/2005, Murdock requested the information from WCI staff. On same 4/7/2005, Hill was informed by Hubbard that Murdock told her that he will not be hiring a Database Analyst, that the FTE had been given to her, and that Murdock was pushing her to get a Data Analyst hired despite the well known fact that Hubbard had never managed Database Analysts before. On 4/10/2005, Hill complained to Cantrell and Murdock by e-mail that he was concerned that none of Murdock's 3/31/2000 concerns were ever mentioned to him prior to the 3/31 meeting. On 5/6/2005, Cantrell requested Hill to attend a meeting on 5/9/2005 at 9:00AM., to discuss "new developments in projects and workload," but was later moved to 4:30 pm. Meanwhile, on 5/9/2005, at about 1:00 pm, Hill filed an internal complaint of discrimination with the Emory EOP office, and met with Sylvester Hopewell (EOP Associate Director) for about 1 hour, and returned to his office. Upon returning to his office, he telephoned Murdock to inform her that he had filed a charge of discrimination. At about 4:30 pm on 5/9/2005, Mr. Hill met with Cantrell and Murdock, and tney informed Hill that his position was eliminated, effective, immediately with 12 weeks severance, and that there was no position available for him in EHC-IS. They noted several times that "This is not about performance".

Significantly, after Hill was terminated, his duties or job responsibilities were absorbed by Cynthia Hubbard (white female) and Michael Graiser (white male); Graiser continued as the Genesys SI Liaison, while the rest of Hill's projects were transferred to Hubbard.

In the entire time that Hill was employed by EHC-IS in 2/1998, EHC had a policy and practice of reabsorbing chargeback IS staff whose positions were either eliminated, terminated and/or chargeback projects were terminated, back into the EHC-IS. Palmich and Cantrell routinely did so for numerous white IS directors, managers and staff, including John Morford, Bill Marcus, Bruce Douglas, Michael Graiser, David Beaulieu, Scott Mazur, Malcolm Barnes, and others. However, Hill was denied such reabsorption by Cantrell after the elimination of his chargeback position at WCI. Also, Hill was never given any FTE support staff, whatsoever, by Cantrell or Murdock, although, he managed in excess of 25 complex projects. No other position was eliminated by pursuant to any restructuring at this time, except Hill's.

2. PROCEEDINGS BELOW

I. The District Court

Petitioner filed his Complaint against Respondents on July 19, 2006. On April 4, 2008, the Defendants filed their summary judgment motion. Hill filed his response on May 12, 2008, and on November 10, 2008, Hon. Mag. Brill entered an Order to serve Parties with her Final Report and Recommendation ("R & R") to grant the employer's motion for summary judgment. Judge Brill concluded, and was adopted by the District judge, that Hill failed to establish a prima facie case of wrongful termination based on his race because Hill did not provide evidence [direct] that Defendants considered race in making the decision to eliminate his position. The district court concluded that Hill's argument that

the circumstances of his termination suggested unlawful discrimination was conclusory and unsupported by citation to the record, and that Hill did not establish pretext for Retaliation, and/or racially discriminatory discharge. Mr. Hill timely filed his Objections to the R & R on November 26, 2008. On December 17, 2008, Judge Shoob entered an Order adopting the R & R, dismissed Hill's claims, a clerk's Judgment of same date in favor of Defendants was entered, and the civil case was terminated on same date.

Additionally, and contrary to the clear guidance of this Court, Brill concluded that Petitioner's unlawful hostile work environment discrimination and disparate treatment clams with regard to his annual merit increases; referral of his team to Wellhouse investigation; demotion to Manager from Director; denial of WCI office space for over 3 years, denial of administrative support and FTEs; undermining of his management authority; refusal of funds to attend work related conference; denial of permanent employee status; refusal to reabsorb him after his position elimination; failure to provide Hill with a list of vacant positions at EHC upon his termination; failure to allow Hill the usual 60-90 days to find another job within the company prior to his effective termination date, and other challenged mistreatment from 2000 until his termination in May, 2005, were trivial, facially neutral and, were not sufficiently severe or perversive to constitute actionable hostile work environment.

With regard to Petitioner's Race discrimination and retaliatory discharge claims, the Magistrate and District Court concluded that Plaintiff could not make our prima

facie case of race discrimination or Retaliations or Pretext, and Granted Respondents' motion for summary judgment. Copies of the Magistrate's Order, as well as the District Judge's Order adopting the Magistrate's recommendations are attached in the Appendix at 48a to 82a and, 15a to 47a, respectively.

II. The Court of Appeals

Petitioner appealed the lower Court's Order granting summary judgment to the Respondents to the Eleventh circuit, and the district court's decision was Affirmed on August 25, 2009, and a copy of the Eleventh Circuit's unpublished Opinion is included in the Appendix at 1a to 14a. With regard to Petitioner's Hostile Work Environment claim, the Eleventh Circuit concluded that while the foregoing employment actions may have been "subjectively humiliating, they were neither objectively threatening nor humiliating. Concerning Petitioner's discriminatory termination and retaliation claims, the Eleventh circuit conflated both claims and incorrectly applying the wrong analytical standard, concluded that Hill failed to show that his termination by WCI was pre-textual, ostensibly, because the

> WCI Woodruff Fund from which Hill was paid were running budget deficits; the program that Hill was hired to develop had moved into a maintenance phase that required less of Hill's time and was handled primarily by an outside vendor; and Hill's remaining job duties were shared among lower earning employees after his termination.

Although, the Court's foregoing conclusions are not true, and although Hill offered unrefuted evidence that the WCI Funds from which his salary was paid were not running budget deficits; that about 9 months earlier, Murdock intentionally elevated Hubbard from a BA III position to WCI Directorship, and transferred all of Hill's duties to her, except one project which was transferred to a white male, Graiser; and that these two employees that were assigned his job duties after he was terminated were members of non-protected class, however, their entire line of inquiry was faulty and misplaced, and should be reviewed by this Court.

REASONS FOR GRANTING THE PETITION

I. There Is Important Conflict Among The Circuit Courts Regarding The Relevant Inquiry To Prove Invidious Discrimination In Employment Where The Terminated Mini-rif Employee's Duties Were Absorbed By Other Non-Protected Employees Rather Than Eliminated Altogether By The Company

In the present case, a jury question is present because the petitioner presented evidence that, when taken as a whole, created a fact issue as to whether the employer created a hostile work environment for Hill, and whether Hill's termination was retaliatory and/or discriminatory. In granting summary judgment, the district court departed from the accepted analytical standard of review set by this Court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. @ 116, quoting, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993); *Reeves v.*

Sanderson Plumbing Products, Inc., 530 U.S. 133, 144, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). This departure was sanctioned by the Eleventh Circuit Court of Appeals. Further, the decision of the Eleventh Circuit Court of Appeals conflicts with the decisions of other Circuit Courts of Appeals on the issue of the quantum of proof necessary to sustain an actionable hostile work environment claim, whether proof of intent is required to carry the prima facie case burden and the appropriate pretext analysis standard in the mini-RIF termination context where the Petitioner has alleged race and/or retaliatory termination. For these reasons, the petition for writ of certiorari should be granted.

This case presents questions about what constitutes invidious discrimination in the context of a one man reduction in force by an employer who terminates a minority (Black) employee in the mini-RIF and, distributes his duties among two retained non-minority (White) employees. The Eleventh circuit answered the question by requiring that such Plaintiff must establish a prima facie case [of age discrimination] that includes proof of intent of the employer to discriminate against the employee. *Smith v. Smith Lanier & Co.*, 352 F.3d 1342, 1344 (11th Cir. 2003); *Padilla v. N. Broward Hosp. Dist.*, 270 Fed. Appx. 966, 971 (11th Cir. 2008).

In so holding, the Eleventh circuit relied on its previous 1996 holding in *Jameson v. Arrow Co.*, 75 F.3d 1528, 1531-32 (11th Cir. 1996) which equally relied on a similar ADEA prima facie case analysis in its finding and departed from the prevailing rule in other circuits. The analytical variation was first introduced by the Fifth circuit in *Williams v. General Motors Corp.*, 656 F.2d

120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982). At that time, the Fifth circuit recognized that the reduction in force age discrimination cases were unlike the typical age discrimination cases where the terminated employee was required to provide evidence of disparate treatment from persons who were under 40 years of age, and thereby introduced a variation of the *Texas Department of Com' Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) prima facie analysis framework that required the employee to present evidence that must lead the fact finder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.

However, only the Sixth, Eighth and Eleventh circuits subscribe to or follow the above Fifth circuit's former RIF prima facie case analyses framework. In analyzing Petitioner's racially discriminatory and retaliatory claims hereof, the Eleventh Circuit relied on its prima facie analysis in *Smith*, id, as follows: (1) she was in a protected age group and was adversely affected by an employment decision, (2) that she was qualified for her current position or to assume another position at the time of discharge, and (3) evidence by which a finder of fact could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision in *Smith v. Smith Lanier & Co.*, 352 F.3d 1342, 1344 (11th Cir. 2003). The Eleventh circuit further explained the third "intent" factor above by opining that

> To establish intent, the plaintiff needs to proffer evidence that could lead a fact finder

> to conclude that (1) the defendant consciously refused to consider retaining the plaintiff because of his race or national origin, or (2) the defendant regarded race or national origin or another protected characteristic as a negative factor in such consideration.

Padilla v. N. Broward Hosp. Dist., 270 Fed. Appx. 966, 971 (11th Cir. 2008).

Respectfully, the D.C., First, Second, Third, Fifth, Seventh and Tenth circuits have explicitly rejected the above view of the Eleventh circuit requiring proof of intent, or what amounts to proof of direct evidence at the prima facie case stage in a mini-RIF case. Instead, these circuits require that in mini-RIF cases, the Plaintiff is not required to show that he was treated differently from similarly-situated employees but, only that his duties were absorbed by other employees who were not members of the protected class[7]. See, *Coburn v. Pan American World Airways*, 229 U.S. App. D.C. 61, 711 F.2d 339 (D.C. Cir.), cert. denied, 464 U.S. 994, 104 S. Ct. 488, 78 L. Ed. 2d 683 (1983), (in a reduction-in-force suit, an employee can establish a prima facie case merely by proving that, while he was fired from a

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7. . *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342-43 (D.C. Cir.), cert. denied, 464 U.S. 994, 104 S. Ct. 488, 78 L. Ed. 2d 683 (1983); *Windham v. Time Warner, Inc.*, 275 F.3d 179 (2nd Cir. 2001); *Massarsky v. General Motors*, 706 F.2d 111, 118 & n. 13 (3rd. Cir.), cert. denied, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 642-43 (5th Cir. 1985); *Oxman v. WLS-TV*, 846 F.2d 448, 455 (7th Cir. 1988); *Branson v. Saccomanno*, 853 F.2d 768, 770 (10th Cir. 1988).

job for which he was qualified, "younger persons were retained and others later promoted." *Id.* at 343. In support of this conclusion, the court stated, "We believe the exigencies of a reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the firing." *Id.* Similarly, in *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3rd Cir.), cert. denied, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983), the Third Circuit stated that "a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably." *Id.* at 118. The court held that the plaintiff had established a prima facie case by proving that while he was laid off, a younger person outside of the protected class was retained. *Id.*; see also *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 n. 2 (3rd Cir. 1984) (plaintiff "established a prima facie case by proof that he was discharged while . . . a younger employee was retained"), cert. denied, 469 U.S. 1087, 105 S. Ct. 592, 83 L. Ed. 2d 702 (1984). The Fourth Circuit held in *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983), that an employee can demonstrate unequal treatment by proving that he was demoted and a younger person in the same position was retained. *Id.* at 1015.

Fundamentally, the Seventh Circuit briefly adopted the rule in *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985), but promptly retreated three years later and explicitly rejected and overruled *Matthews*, and adopted a more workable and practical rule in

Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988). The Seventh Circuit subsequently opined that:

> "A RIF occurs when an employer permanently eliminates certain positions from its work force, and because the employer has removed the position entirely from its work force, the position will never be refilled. . . . In such a case it makes little sense to require a plaintiff to meet the fourth prong of the *Mcdonnell Douglas* test in which the plaintiff must demonstrate that the position remained open or was filled by someone who is not a member of the protected class. Instead, we require a plaintiff to demonstrate that other similarly situated employees who were not embers of the protected class were treated more favorably." *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 693-94 (7th Cir. 2000).

Furthermore, "[W]hen a terminated employee's duties are absorbed by other employees, rather than eliminated from the company altogether, the appellate Court does not require the former employee plaintiff to make out a prima facie case normally required for reduction in force cases." *Paluck v. Gooding Rubber Company*, 221 F.3d 1003, 1012 (10) (7th Cir. 2000), citing, *Michas v. Health Cost Controls of Ill., Inc., Id.* "The fungibility of jobs is implicit when a terminated employee's responsibilities are absorbed by other employees." *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1331 (7th Cir. 1995).Thus, in a mini-RIF the relevant inquiry is not whether the plaintiff was replaced by a younger [non-protected] employee, but whether

the plaintiff was terminated amid circumstances that suggest unlawful discrimination. *Yates v. Rexton, Inc.*, 267 F.3d 793, 799 (8th Cir. 2001); *Montana v. First Federal Sav. and Loan Ass'n of Rochester*, 869 F.2d 100, 104 (2nd Cir. 1989).

The Tenth Circuit has similarly held as follows:

> "We hold that the district court erred in concluding that plaintiffs failed to establish a prima facie case of discriminatory discharge. Evidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent and to require the employer to articulate reasons for its decision. While reduction-in-force cases present exigencies not present in other employment discrimination cases, these exigencies are best analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the discharge. See, e.g., *Coburn v. Pan American World Airways, Inc.*, 229 U.S. App. D.C. 61, 711 F.2d 339, 343 (D.C. Cir.), cert. denied, 464 U.S. 994, 78 L. Ed. 2d 683, 104 S. Ct. 488 (1983). . . . In *Foster v. MCI Telecommunications Corp.*, 773 F.2d 1116 (10th Cir. 1985), we stated that the plaintiff in a reduction-in-force case must show he was "as qualified" as the retained workers in order to establish a prima facie case. However, careful rereading of the case relied on as support for this statement, *United States Postal Serv. Bd.*

> *of Governors v. Aikens*, 453 U.S. 902, 69 L. Ed. 2d 989, 101 S. Ct. 3135 (1981), convinces us this statement was inaccurate.

Thus, it is clear that there is an important split among the circuits in the proper prima facie analysis standard in the context of the so-called "one-man" or "mini-RIF" terminations claims. No doubt, it is clear that the prima facie case rule applied by the Eleventh Circuit is the minority position and should be rejected in favor of the Seventh and Tenth circuits' analytical rationale and standard. Applied to the Petitioner's case hereof, it is undisputed that all of Hill's job duties (over 21 projects), except one project, were absorbed by a white female, Hubbard, and the one project was absorbed by a white male, Graiser. Thus, Hill clearly satisfied his mini-RIF racial termination and retaliation case burden contrary to the Eleventh Circuit's finding.

Furthermore, the Eleventh Circuit's conclusion that Hill did not show pretext is in error and should be rejected by this Court. Interestingly, no mini-RIF discrimination plaintiff in the Eleventh circuit has ever prevailed under the Eleventh circuit's unattainable analytical standard. Whether the foregoing split among the circuits reflect a continuing difficulty lower courts face in discerning the "subtle" and practical realities associated with fitting the reduction in force factual circumstances within the well established prima facie case analytical framework, or an intentional unwillingness of the Eleventh Circuit to adhere to the majority prevailing analytical rule, the decision below should be reviewed and corrected by this Court. One of this nation's largest circuit courts, encompassing some

of the most populous regions in the southeast, has misconstrued this Court's precedents. To allow the Eleventh circuit's ruling below to stand will invite further confusion in this important area of discrimination law, and will continue to work immeasurable damage to putative plaintiffs whose discrimination claims will continue to be analyzed under erroneous standards.

II. Review Is Warranted To Resolve A Conflict Among The Circuit Courts Concerning What Employer Actions Constitute Adverse Employment Action, And The Quantum Of Proof A Plaintiff Must Adduce To Sustain An Actionable Hostile Work Environment Claim.

The foregoing clear and acknowledged conflict is more than sufficient, by itself, to justify review. But review is all the more necessary because the Eleventh circuit's decision departs from this Court's precedents, and sets the quantum of proof bar far higher than the precedential cases of this Court dictate. The decision also conflicts with the Eleventh Circuit's own precedents and those of other Circuits. This Court has instructed that "In determining whether actionable hostile work environment exists, we look to 'all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S. Ct. 2061, 2074, 153 L. Ed. 2d 106, 124 (2002). Thus, "a hostile work environment claim is comprised of a series of separate

acts that collectively constitute one 'unlawful employment practice.'" *Id.*, 42 U.S.C. §2000E-5(E)(1). Interestingly, the Eleventh Circuit has previously opined that

> [H]arassment need not be shown to be so extreme that it produces tangible effects on job performance in order to be actionable, and the establishment of the frequency, severity, and humiliating nature of the conduct can be sufficient even if a plaintiff fails to establish convincingly how the conduct interfered with her duties.

Shockley v. Healthsouth Central Georgia Rehab. Hosp., 2008 U.S. App. LEXIS 20011 *12 (11th Cir. 2008).

Contrary to this Court's foregoing guidance, the Court below held that Petitioner's proof of unlawful adverse action and hostile work environment discrimination and disparate treatment with regard to his annual merit increases; referral of his team to Well House investigation; demotion to Manager from Director; denial of WCI office space for over 3 years after he became a director, denial of administrative support and FTEs; undermining of his management authority; denial of work related conference attendance; assignment of overwhelming workload; denial of permanent employee status and title as he previously held; refusal to reabsorb him after his position elimination; failure to provide Hill with a list of vacant positions at EHC upon his termination; failure to allow him the usual 60-90 days to find another job within the company prior to his effective termination date, and

other disparate treatment from his white counterparts in his terms and conditions of employment from the moment of his employment in 1998, and which continued through his termination in May, 2005 were trivial, or facially neutral and "normal workplace decisions that strike at the very hear of an employer's business judgment and expertise because they challenge a employer's ability to allocate its assets in response to shifting and competing market priorities" and thus, were not severe or perversive enough to constitute actionable hostile work environment. The holding is in error, conflicts with other circuits, and should be reviewed and reversed. Respondents' misconduct were clearly numerous in frequency, grave in severity, greatly deteriorated Petitioner's health, and humiliating nature of the conduct is subjectively and objectively evident.

No doubt, the Eleventh circuit's foregoing restrictive decision conflicts with its own precedents and the First, Seventh, Ninth, Tenth, and D.C. circuits which take an expansive view of the types of employment actions that constitute actionable hostile work environment and adverse employment action. Thus, there is a clear split in the Circuit Courts of Appeal on the issue of what constitutes an adverse employment action sufficient to sustain an actionable hostile work environment claim under Title VII. The First, Seventh, Tenth, and D.C. Circuits all take an expansive view of the types of action that can be considered adverse employment actions. *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other

employees"); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (employer can be liable for retaliation if it permits "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments"); *Corneveaux v. CUNA Mutual Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996) (employee demonstrated adverse employment action under the ADEA by showing that her employer "required her to go through several hoops in order to obtain her severance benefits"); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (malicious prosecution by former employer can be adverse employment action); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (Act of defendant, plaintiff's former employer, in advising a prospective employer of fact that plaintiff had filed a sex discrimination charge against defendant was an act of retaliation and, as such, a violation of Title VII, making it an "unlawful employment practice" for an employer to discriminate against an employee for making a discriminatory employment charge); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (adverse employment actions include an employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment); *Passer v. American Chemical Soc.*, 935 F.2d 322, 330-331 (D.C. Cir. 1991) (employer's cancellation of a public event honoring an employee can constitute adverse employment action under the ADEA, which has an anti-retaliation provision parallel to that in Title VII).

Here, in addition to the foregoing hostile actions, it is undisputed that Hill and his team were selectively subjected to a psychological investigation and counseling by the Emory Wellhouse; that Cantrell actively solicited derogatory comments from Hill's subordinates about him to justify her subsequent threat to terminate Hill, deceptively moved Hill from a full time permanent Manager EHC position to a temporary charge-back WCI position without informing him, all of which caused Hill tremendous mental and physical distress and interfered with his work.[8] This Court should grant the petition to resolve this actual conflict, particularly, as many courts will continue to confront similar issues as to the quantum of proof required to sustain actionable hostile work environment claims.

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8. As a direct result of the foregoing discriminatory conduct of Murdock, Cantrell, and Simons, Hill suffered a severe decline of good health, developed irregular heart beat in 2003, suffered loss of hair and other skin conditions, abdominal pains, headaches, nervousness, insomnia, loss of appetite, severe stress and other ailments as a result of the discrimination he suffered and was treated by his family medical practitioners.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be Granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 25, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-10350
Non-Argument Calendar

D.C. Docket No. 06-01699-CV-MHS-1

LEROY HILL, JR.,

Plaintiff-Appellant,

versus

EMORY UNIVERSITY, EMORY HEALTHCARE, INC., d.b.a. Emory Winship Cancer Institute, DEDRA F. CANTRELL, a.k.a. Dedra Frutchey, SANDRA MURDOCK,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(August 25, 2009)

Before MARCUS, WILSON and ANDERSON, Circuit Judges.

Appendix A

PER CURIAM:

Leroy Hill, Jr., appeals the district court's grant of summary judgment in favor of his employer, Emory University and Emory Healthcare, Inc. ("EHC"), which operated the Emory Winship Cancer Institute, ("WCI"), and two of its employees, EHC Chief Information Officer Dedra F. Cantrell and WCI Chief Operating Officer Sandra Murdock, on his claims of termination based on race, in violation of 42 U.S.C. § 1981; termination based on race, retaliation, wage discrimination; and a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a); and, a state law claim of negligent retention. He also appeals the court's denial of his motion to compel discovery and the court's subsequent award of attorneys' fees to the defendants, which we will address first.

I. Award of attorneys' fees and motion to compel

Hill argues that the district court's award of attorneys' fees was unwarranted because his motion to compel was substantially justified. The dispute between the parties centered around the breadth of discovery. Hill contends that his work was university-wide in scope because he worked for WCI, but continued to report in part to Cantrell at EHC. Furthermore, Hill argues, the defendants later produced most of the objected-to information. Hill thus contends that a genuine dispute between the parties existed and that the motion was substantially justified.

Appendix A

We review the denial of a motion to compel discovery for an abuse of discretion. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006) (citation omitted). We also review a district court's decision regarding sanctions under Federal Rule of Civil Procedure 37 for an abuse of discretion. *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1146-47 (11th Cir. 2006) (citation omitted). A district court abuses its discretion when it misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous. *Mincey v. Head*, 206 F.3d 1106, 1137 n. 69 (11th Cir. 2000), *cert. denied*, 532 U.S. 926 (2001) (citation omitted).

Under the Federal Rules of Civil Procedure, a party is permitted to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . ." FED. R. CIV. P. 26(b)(1). The information sought does not need to be admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* District courts can limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit. . . ." FED. R. CIV. P. 26(b)(2)(c)(iii). Under Rule 37, a party may move to compel disclosure under Rule 26, and "[a] party seeking discovery may move for an order compelling an answer, designation, production, or inspection." FED. R. CIV. P. 37(a)(3)(A), (B). When such motion is denied, the court "must . . . require the movant, the attorney filing the motion, or both to pay the party . . . who opposed the motion its reasonable expenses incurred in opposing the motion, including

attorney's fees." FED. R. CIV. P. 37(a)(5)(B). However, the court should not order payment "if the motion was substantially justified or other circumstances make an award of expenses unjust." *Id.* "Substantially justified means that reasonable people could differ as to the appropriateness of the contested action." *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846, 853 (11th Cir. 1997) (citation omitted).

Hill has not established any abuse of discretion in the denial of his motion to compel discovery or in the award of attorneys' fees because he did not challenge the district court's conclusion that several of his requests were difficult to interpret and improperly worded. Therefore, he has not shown that his motion was substantially justified.

II. Discriminatory termination claim

Hill argues that the district court erred in granting summary judgment on his § 1981 and Title VII discriminatory termination claims because he believes that the court required him to produce direct evidence of discrimination in order to meet his burden. Although he concedes that he "did not necessarily produce any direct evidence" of discrimination, he argues that the coincidental events surrounding his termination could lead reasonable jurors to conclude that he was terminated and not considered for retention because of his race. In support, Hill cites: (1) the rapid rise of Cindy Hubbard, a Caucasian woman; (2) the defendants' acknowledgment that his termination was not based on

performance; and (3) the defendants' refusal to reabsorb him into a different position after he was terminated as they had done for others. Furthermore, Hill argues that he established that the defendants' proffered reasons for his termination were pretextual because Hill worked on several projects beyond the development of the GeneSys SI ("GSI") program, which was the main program he was hired to develop, including many projects initially assigned to Hubbard that were all reassigned to Hubbard when he was terminated. He also emphasizes his belief that the WCI account consistently had a budget surplus. Hill relies on the same evidence in arguing that the district court erred in granting summary judgment to the defendants on his retaliation claim.

We review a district court's grant of summary judgment *de novo*, viewing all evidence in a light most favorable to the non-moving party. *Martin v. Brevard County Pub. Schs.*, 543 F.3d 1261, 1265 (11th Cir. 2008) (per curiam) (citations omitted). Summary judgment is appropriate when there is no genuine issue of material fact, thereby entitling the movant to judgment as a matter of law. FED. R. CIV. P. 56(c). Summary judgment should be awarded "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Additionally, a mere scintilla of evidence is not enough to survive summary judgment; a plaintiff must present enough evidence to enable a reasonable jury to find for

her by a preponderance of the evidence. *Shotz v. City of Plantation*, 344 F.3d 1161, 1184 (11th Cir. 2003).

Under 42 U.S.C. § 1981, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). Claims of race discrimination under § 1981 are analyzed in the same manner as claims brought under Title VII. *Rice-Lamar v. City of Fort Lauderdale*, 232 F.3d 836, 843 n. 11 (11th Cir. 2000), *cert. denied*, 534 U.S. 815 (2001) (citation omitted).

To establish a *prima facie* case of the discriminatory elimination of a position under Title VII, a plaintiff may show "(1) that [he] was in a protected [class] and was adversely affected by an employment decision, (2) that [he] was qualified for [his] current position or to assume another position at the time of discharge, and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate . . . in reaching that decision." *Smith v. J. Smith Lanier & Co.*, 352 F .3d 1342, 1344 (11th Cir. 2003) (per curiam) (internal quotation marks and citation omitted). To

establish intent, a plaintiff needs to proffer evidence that could lead a fact finder to conclude that "(1) [the] defendant consciously refused to consider retaining a plaintiff because of his [race], or (2)[the] defendant regarded [race] as a negative factor in such consideration." *Allison v. W. Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982) (citation omitted).

Title VII prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter]." 42 U.S.C. § 2000e-3(a). To establish a *prima facie* case of retaliation under Title VII, a plaintiff must show that: (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a causal connection between the protected activity and the adverse employment action. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) (citation omitted). The causal connection prong requires a plaintiff to show "that the decision-makers were aware of the protected conduct, and that the protected activity and the adverse action were not wholly unrelated." *McCann v. Tillman*, 526 F.3d 1370, 1376 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 404 (2008) (internal quotation marks, alterations, and citations omitted). A causal connection can be established by the close temporal proximity between the protected activity and the adverse action. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (per curiam) (citation omitted).

Appendix A

When a plaintiff uses circumstantial evidence in an attempt to prove discrimination or retaliation under Title VII, we apply the burden shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). Under the *McDonnell Douglas* framework, a plaintiff has the initial burden to establish a *prima facie* case of discrimination, which, if sustained, creates a presumption that the employer discriminated against the plaintiff. *Brooks v. County Comm'n of Jefferson County*, 446 F.3d 1160, 1162 (11th Cir. 2006) (citations omitted).

If the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to provide a legitimate, non-discriminatory reason for the action taken, which rebuts the presumption of discrimination. *Id.* If such a reason is presented, the plaintiff must establish that the employer's reason is a pretext for unlawful discrimination. *Id.* Despite the shifting of burdens of production, the ultimate burden to prove intentional discrimination remains with the plaintiff. *Id.*

In order to demonstrate pretext, a plaintiff must show that the employer's offered reason was not the true reason for its decision, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005) (internal quotation marks and citation omitted). "Provided that the proffered reason is one that might motivate a

reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc) (citations and footnote omitted). To survive summary judgment, "a plaintiff must produce sufficient evidence for a reasonable factfinder to conclude that each of the employer's proffered nondiscriminatory reasons is pretextual." *Id.* at 1037. A plaintiff can establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) (internal quotation marks and citation omitted).

Here, the record showed that both WCI and the Woodruff Fund, from which Hill was paid, were running budget deficits; the program that Hill was hired to develop had moved into a maintenance phase that required less of Hill's time and was handled primarily by an outside vendor; and, Hill's remaining job duties were shared among lower-earning employees after his termination. Hill did not show that these stated reasons for his termination were pretextual. Therefore, Hill did not establish that the district court erred in granting summary judgment to the defendants on his termination or retaliation claims.

Appendix A

III. Wage discrimination

Hill also argues that he established a *prima facie* case of wage discrimination because the two employees he identified, Hubbard and Michael Graiser, who are both Caucasian, were similarly situated to him. Hill notes that he was assigned almost all of Hubbard's projects in June 2004, thereby performing identical job duties for much lower pay raises. Furthermore, when Hubbard was promoted to director, they shared a job title and reported to the same supervisor. Both Hill and Hubbard established and managed a budget, served as technical experts to clients, oversaw the administration of GSI data, and supervised a staff of professionals. In addition, Hill asserts that he was similarly situated with Graiser because both "used users, technologies, vendors" and "did some of the same work."

In order to establish a *prima facie* case of intentional compensation discrimination based on race, the plaintiff must establish that: (1) he belongs to a racial minority; (2) he received low wages; (3) similarly situated comparators outside the protected class received higher compensation; and (4) he was qualified to receive the higher wage. *See MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (discussing wage discrimination in the ADEA context). We have held that the denial of a pay raise can constitute an adverse employment action that affects a plaintiff's compensation. *Gillis v. Ga. Dep't of Corrs.*, 400 F.3d 883, 887 (11th Cir. 2005). We have held that a "comparator must be nearly identical to the plaintiff to prevent courts

from second-guessing a reasonable decision by the employer." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004).

Hill failed to establish a *prima facie* case of wage discrimination because he did not establish the presence of any similarly situated comparators. The record demonstrates that both Hubbard's and Graiser's jobs involved different responsibilities than Hill's job. Furthermore, both Hubbard and Graiser received salary increases when they presented their employer with evidence of a competing offer of employment. In contrast, Hill never received a competing offer of employment. Therefore, Hill, Hubbard, and Grasier were not "similarly situated in all relevant respects." *Id.* (internal quotation marks and citation omitted). We find no error in the district court's grant of summary judgement to the defendants on Hill's wage discrimination claim.

IV. Hostile work environment

Hill further contends that the district court erred by granting summary judgment to the defendants on his hostile work environment claim because he established that he experienced severe and pervasive harassment. Hill argues that he experienced an unbroken chain of harassment that included: (1) a department-wide "pulse check" to gauge morale, which resulted in a referral to a counseling session for his workgroup; (2) a demotion in job title from director to manager while at EHC; (3) the repeated denial of his

requests for supporting office staff; (4) the fact that one of his hiring decisions was denied, with Hubbard being hired instead; (5) the denial of his request to attend an educational conference; (6) failure to classify him as a regular WCI employee instead of a "chargeback" employee associated with EHC; (7) the failure to assign him any direct reports; (8) the failure to assign him office space; (9) the failure to award him pay raises comparable to Hubbard and Graiser; (10) the failure to reabsorb him after his job was terminated or provide him with a list of available job openings; and (11) the termination of his employment.

To establish a hostile work environment claim pursuant to Title VII, a plaintiff must prove "that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002) (internal quotation marks and citation omitted). The employee has the burden of proving a hostile work environment claim. To establish such a claim, a plaintiff must show: "(1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic . . . such as [race]; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment

under either a theory of vicarious or of direct liability." *Id.* at 1275 (citation omitted). The requirement that the harassment be "severe or pervasive" contains an objective and subjective component. *Id.* at 1276. "Thus, to be actionable, this behavior must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceive[s] to be abusive." *Id.* (internal quotation marks, alterations and citation omitted).

In evaluating the objective severity of the harassment, we look at the totality of the circumstances and consider: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." *Id.* We agree with the district court that the employment actions cited by Hill were not so objectively severe or pervasive as to alter the terms and conditions of his employment. Although he may have been subjectively humiliated, Hill's cited actions are objectively neither threatening nor humiliating. Therefore, the district court did not err in granting summary judgment to the defendants on Hill's hostile work environment claim.

V. State negligent retention claim

Finally, Hill argues that his state negligent retention claim should be allowed to proceed because he persistently complained to human resources, WCI's Executive Director Jonathan Simons, Murdock, and

others about the discrimination, but they failed to act to correct it. However, his Georgia law negative retention claim is an "essentially derivative" claim that survives summary judgment only if the substantive claims on which it was based also survive. *See Phinazee v. Interstate Nationalease, Inc.*, 514 S.E.2d 843, 846 (Ga. Ct. App. 1999). Here, the district court properly granted summary judgment to the defendants on Hill's derivative state negligent retention claim because summary judgment was appropriate for the other substantive claims.

VI. Conclusion

Upon thorough review of the record and the parties' briefs, we discern no reversible error. Accordingly, we affirm.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED DECEMBER 17, 2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.

1:06-CV-1699-MHS

LEROY HILL, JR.,

Plaintiff,

v.

EMORY UNIVERSITY, et al.,

Defendants.

ORDER

The matter before the Court is the Magistrate Judge's Report & Recommendation (R&R) and plaintiff's objections to the R&R.

Background

The Court adopts the following undisputed facts as stated in the R&R and in plaintiff's objections to the R&R.

Appendix B

A. *Plaintiff is Hired*

In February 1998, Plaintiff, who is African American, was hired by Emory Healthcare ("EHC") as the Director of Data Services and Decisions Support in EHC's information services ("IS") department. Plaintiff reported directly to the Executive Director of Applications Services, Dedra Frutchey Cantrell, who in turn reported to Ron Palmich, the Chief Information Officer ("CIO"). Cantrell and Palmich are both Caucasian. . . .

As Director of Data Services, Plaintiff led a team of about fifteen employees consisting of application developers, database administrators, data administrators, and business analysts.

. . . .

B. *Plaintiffs Performance Evaluations*

Plaintiff received his first performance evaluation on August 10, 1998, approximately six months after his employment began. The evaluation included high praises from his departmental peers, who contributed to the evaluation. . . .

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> On April 5, 1999, Plaintiff received his first annual performance review and was rated very highly by Cantrell in every review category. . . .
>
> That same year, Plaintiff received an award from his employer for Best Return on Investment. Plaintiff also received positive performance evaluations in 2000 and 2001.

R&R, pp. 2-5. Plaintiff adds that:

> On July 20, 2000, Plaintiff Hill received another performance review as Data Services Director for the period 1/01/00 - 7/31/2000, and was rated as "Meets Expectations" in all evaluation categories . . . , and there was no mention of any derogatory information or adverse rating regarding Hill's performance and skill with respect to Customer Service, Communication, Leadership, Teamwork, Initiative, Job Knowledge, Attendance and Work Routine, Project Management, and/or Listening skills, nor was there any adverse commentaries or mention by Cantrell about any perceived inability of Hill to perform up to expected standards in terms of "Staff competency, Performance Expectations, Overall Assessment and Feedback" evaluation categories. On July 13, 2001, Plaintiff Hill

> received his performance review as Manager of Data Applications for the period 7/00 - 7/01, and was again rated as "Meets Expectations" in all evaluation categories . . . , and there was no mention of any derogatory information or adverse rating regarding Hill's performance and skills . . . nor was there any adverse commentaries or mention by Cantrell about any perceived inability of Hill to perform up to expected standards . . . .

Pl.'s Objection to R&R, pp. 5-7.

The R&R continues:

> C. ***Complaints about Plaintiff's Management Skills***
>
> In February 2000, Palmich asked Cantrell to assist him in conducting what he called a "Pulse Check" in the IS department. During the Pulse Check, several employees under Plaintiff's supervision complained to Cantrell about Plaintiff's leadership skills. They also reported that Plaintiff did not listen or respond to concerns they raised, that he failed to take action to solve problems, that he failed to set priorities, that he would force-fit tools or models that the staff found confusing and frustrating, that he did not fairly distribute work among the staff, and that he lacked vision and strategy. Around the

> same time, a member of Plaintiff's workgroup, Bruce Douglas, requested a transfer out of the IS department. . . .
>
> On January 26, Palmich and Cantrell met with Plaintiff and Douglas to discuss the reasons for Douglas' transfer request. Douglas repeated the comments he had made to Plaintiff about his desire to transfer and concern about insufficient staff. . . .
>
> After the Pulse Check, Cantrell met separately with Douglas and asked if he was dissatisfied with Plaintiff's leadership skills. Douglas confirmed that he was and also commented that working for Plaintiff was like being in the movie "Groundhog Day," where every day is an exact repetition of the day before and nothing is accomplished. Douglas also reported to Cantrell that he believed that most of the Data Services group shared his opinion of Plaintiff and that he would not return to the group as long as Plaintiff was the manager.

R&R, pp. 6-7.

Plaintiff claims that the true purpose of the Pulse Check, contrastingly, was because Cantrell and Palmich were angry that Douglas, a white male, was leaving plaintiffs department, and Woodley noted that something had to be done about "Leroy." (Pl.'s Objection to R&R, p. 5.)

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The R&R continues:

> Around March 1, 2000, Cantrell and Palmich met with Plaintiff regarding the performance problems that were mentioned by his employees during the Pulse Check. After the meeting, Cantrell and Palmich issued Plaintiff a written counseling regarding the performance problems. The memorandum warned Plaintiff that "these are serious leadership performance deficiencies and if not corrected immediately could result in termination." After Plaintiff received the written counseling, he worked with Cantrell to develop a written action plan to address the performance issues.
>
> During the process of developing the written action plan, Plaintiff and Cantrell consulted with EHC's Human Resources ("HR") department. The HR department recommended that Plaintiff's group participate in a dialogue facilitated by Emory's faculty and staff assistance program, "Wellhouse." Wellhouse offered a program that encouraged employees to air frustrations and assess interpersonal dynamics. In March and April 2000, Plaintiff's group participated in the program. . . .

R&R, pp. 8-9.

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Plaintiff also has introduced evidence that he claims shows that:

> Plaintiff inherited a poor cadre of staff when he took over the department, that the contrived allegations of poor management skills were not mentioned in his performance evaluation by Cantrell covering the period prior to and after such criticism, that the identified individuals that made the allegations received poor performance evaluations from Plaintiff, and either resented Plaintiff's supervision of them, were unable to cope with the fast pace of the rigorous workload of the workgroup, and/or were low skilled performers who were not technically equipped to perform the work.

Pl.'s Objection to R&R, p. 4.

The R&R continues:

> D. ***Plaintiff's Complaints About Discrimination***
>
> On March 22, 2000, Plaintiff complained to Larry Hodges, HR Director for EHC, that the discipline he received from Cantrell and Palmich was unfair and differed from that received by other managers. Plaintiff also complained to Emory's Equal Opportunity Program Administrator, Bob Etheridge, about the discipline. After the complaints, Plaintiff and Cantrell agreed to move forward with a "clean slate."

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On October 17, 2000, Plaintiff complained to Dana Bible, an HR employee for EHC, that African American job applicants were interviewed by a greater number of employees than Caucasian applicants. Plaintiff also complained that he was subjected to race discrimination, specifically in being required to participate in the Wellhouse program. . . .

E. Plaintiff's Job Title Changes

Effective July 31, 2000, the HR department and Palmich changed the job titles of several directors who were direct reports of Cantrell to more accurately reflect their roles in the department. The "directors" were reclassified as "managers." Plaintiff was one of the directors affected by this change in job title; his title changed from "Director of Data Services and Decision Support" to "Manager of Data Applications." This change in job title did not affect Plaintiff's job duties or salary.

F. Plaintiff Becomes a Director for WCI

In March 2001, Cantrell and Palmich asked Plaintiff to apply for the position of Director of Oncology Informatics at the Emory Winship Cancer Institute ("WCI"). Plaintiff applied for and was given the position, which provided him with a 10% pay

increase. Plaintiff's primary role in his new position was project manager for a high-profile informatics project known as GeneSys SI ("GSI"). GSI was a system that combined information from multiple sources to allow users to compare data in an effort to determine the causes of a particular type of cancer, the best methods of treatment, and the most effective means of prevention. . . .

Administratively, Plaintiff remained an EHC employee. His salary was "charged back" to WCI, meaning that WCI paid Plaintiff's salary while he remained an employee of EHC. . . . .

. . . .

Following his new assignment, Plaintiff's office was relocated to the second floor of the EHC building. Plaintiff requested office space from WCI but was told that no space was available at that time. In July 2003, WCI Building C opened, and Plaintiff's peers moved into private offices in that building. Plaintiff again requested office space from WCI, but his request was denied. In October 2003, Plaintiff learned of plans to return his office to the fourth floor of the EHC building. Unhappy with this plan, he complained about his office space situation to the Chief Executive Officer of EHC. The next day, he received office space in WCI Building B.

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Despite the number of assignments given to Plaintiff, he was the only WCI director who had no direct reports or staff. Plaintiff sought new FTEs on two occasions in June 2004, but both proposals were rejected. In December 2001, Plaintiff received permission to hire an employee for the position of Business Analyst III. Plaintiff conducted the hiring process and made an offer to an African American applicant. Cantrell and Murdock rescinded the offer made by Plaintiff and ultimately hired a Caucasian applicant, Cindy Hubbard.

In November 2002, Plaintiff requested funding to attend a conference related to the GSI project. Murdock rejected Plaintiff's request, and Plaintiff paid his own way to the conference. Around the same time, Murdock informed Plaintiff that she approved Hubbard's request for funding to attend a work-related conference in California.

G. ***Salaries***

During the 2004 fiscal year, Plaintiff received a salary of $119,018. Plaintiff's annual salary as of his termination on May 9, 2005 was $125,652.80. Beginning in June 2004, Hubbard received an annual salary of $92,393.64. . . . Hubbard was promoted to Director of Information Technology Operations in March 2005, and her salary increased to $101,863.92.

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Michael Graiser ("Graiser") is a Caucasian who was employed by WCI to understand the needs of physicians and utilize the existing systems within WCI to provide solutions to their needs. Graiser received a salary of $61,800 from September 2004 to March 2005. In March 2005, Graiser's salary increased to $75,600.

H. ***Plaintiff Applies for CIO Position***

In 2005, Emory University sought candidates for a position with the title "Vice President for Information Technology/Chief Information Officer" ("CIO"). It retained an executive search firm to seek an individual with (1) previous CIO experience, preferably at another academic institution; (2) previous management experience at an organization with a similar budget and number of employees; and (3) a relevant graduate degree. . . .

On March 22, 2005, Plaintiff applied for the CIO position. A recruiter employed by the executive search firm evaluated Plaintiff's background and determined that he lacked the minimum qualifications for the position. At the time, the recruiter did not know Plaintiff's race. . . .

R&R, pp. 9-14.

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Plaintiff points out that, prior to plaintiff's termination Murdock elevated Ms. Hubbard from a Business Analyst III to an IT leadership Director position within less than 1 year, such that on March 1, 2005, Hubbard was promoted from Business Analyst III to Director of Information Technology, and within 2 months thereafter, was assigned all but one of Plaintiff's previously assigned projects after his termination. (Pl.'s Objection to R&R, p. 7.)

The R & R continues:

> I. ***Plaintiff's Termination***
>
> In 2004, GSI moved from its original developmental phase into a maintenance phase, which required less oversight by Plaintiff. Also, GSI began to suffer from budget problems as its spending far exceeded its revenue. Due to the budget problems, funding for GSI – including Plaintiff's salary — was thereafter provided by the Woodruff Fund, Inc., a charitable foundation account.
>
> Plaintiff met with Cantrell and Murdock on March 31, 2005 for a mid-year evaluation. During the meeting, Plaintiff told Cantrell and Murdock that "they were discriminating and treating [him] differently from [his] Director peers . . . by refusing [him] resources and then complaining about projects [sic] incompleteness."

R&R, p. 15.

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Plaintiff contends that, at the mid-year Performance Checkpoint:

> Hill handed out his completed Employee Discussion Questionnaires, and sought to discuss the contents, however, Murdock showed absolutely no interest and went over to the white board with her back turned to Hill and Cantrell. At the end of Hill's presentation, Murdock interjected she wanted to discuss other things, and proceeded to list all project items that were not completed . . . Hill further complained to Murdock and Cantrell that they were discriminating and treating him differently from his Director peers; that they were intentionally setting him up to fail by refusing him resources and then complaining about projects incompleteness and holding him to a much higher standard of performance than was being applied to his WCI peers, because all of them stated to him that they were never subjected to mid-year reviews by Murdock.

Pl.'s Objection to R&R, p. 8.

The R&R continues:

> Shortly thereafter, Murdock planned the fiscal year 2006 budget, in which she implemented various budget cuts. During this process, she considered eliminating Plaintiff's position. She then discussed the elimination of Plaintiff's position with Cantrell. Murdock

> and Cantrell agreed to terminate Plaintiff's employment and, on April 6, 2005, formally requested the personnel action from the HR department. . . . Murdock and Cantrell then scheduled a termination meeting with Plaintiff for May 9, 2005 at 4:30 p.m. and prepared a termination letter to give to him at the meeting.
>
> On May 9, at around 1 p.m., Plaintiff complained of discrimination to an employee with the Emory Equal Opportunity Programs office. Upon returning to his office, Plaintiff telephoned Murdock to inform her of his complaint. At 4:30 p.m., Murdock and Cantrell met with Plaintiff to inform him of the decision to eliminate his position. . . .
>
> Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on July 20, 2005, alleging race discrimination and retaliation. The EEOC issued Plaintiff a notice of right to sue on March 31, 2006. This lawsuit followed.

R&R, pp. 15-16.

Standard of Review

The District Court conducts a *de novo* review of the R&R prepared by the Magistrate Judge. Summary judgment is proper when no genuine issues of material

fact are present and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Id.*

Discussion

(1) Racial Harassment Claim

The R&R first assesses plaintiff's racial harassment claim. To establish a claim of racial harassment, plaintiff must show that (1) he belongs to a protected group; (2) he has suffered unwelcome harassment; (3) the harassment was based on his protected characteristic; (4) the harassment was severe or pervasive; and (5) a basis for holding the employer liable exists. *Hulsey v. Pride Rests.*, 367 F.3d 1238, 1244 (11th Cir. 2004) (applying equivalent standard for sexual harassment). A racial harassment claim may be based on conduct that is not explicitly of a racial nature. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Plaintiff must merely show that mistreatment was directed at him *because* of his race. *Id.* at 81. "In determining whether an actionable hostile work environment claim

exists, we look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

The Magistrate Judge considered the following facially neutral actions in determining whether a hostile work environment existed: (1) plaintiff's Pulse Check, written counseling, and referral to Wellhouse; (2) plaintiff's change in job title from 'director' to 'manager'; (3) plaintiff's denial of office space in a WCI building; (4) plaintiff's denial of adequate support staff; (5) the rescission of plaintiff's offer to hire an African American candidate for a position at WCI; and (6) plaintiff's denied request for funding to attend a work-related conference and a Caucasian employee's subsequent receipt of funding to attend a separate work-related conference. After assessing these instances holistically, the Magistrate Judge determined that "Plaintiff's complaints concern normal workplace decisions, which 'strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets in response to shifting and competing market priorities.'" R&R, p. 21 (quoting *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1244 (11th Cir. 2001)). Accordingly, the Magistrate Judge determined that plaintiff had not met his burden of showing that he

suffered severe or pervasive harassment because of his race.

Plaintiff counters that the Pulse Check, the written counseling, and the referral to Wellhouse were unnecessary because Bruce Douglas' stated reasons for requesting a transfer were unrelated to plaintiff. Plaintiff adds that "[a]lthough many employees have resigned, complained about their managers/directors, and/or transferred out of other EHC-IS work groups previously . . . no White directors/managers, or project manager and his or her staff had ever been investigated, intimidated, threatened with termination or had the employees interviewed or ordered to undergo psychological counseling or questioning sessions . . . because their employees resigned or transferred to another department in the entire history of the EHC-IS." (Pl.'s Objection to R&R, p. 13.)

This Court agrees with the Magistrate Judge that the Pulse Check, the written counseling, and the Wellhouse referral were not forms of harassment against plaintiff. Rather, all three of these were legitimate activities designed to assess employee morale and address concerns with the leadership in the various IS workgroups. Cantrell testified that she received multiple complaints regarding plaintiff during this process. Further, Bruce Douglas told Cantrell that plaintiff was the reason why he had decided to leave the IS department. Other department employees concurred that plaintiff "did not listen or respond to concerns they raised, that he failed to take action to solve problems,

that he failed to set priorities, that he would force-fit tools or models that the staff found confusing and frustrating, that he did not fairly distribute work among the staff, and that he lacked vision and strategy." (R&R, p. 6.) Plaintiff's written counseling was the result of the comments from department employees regarding his leadership style acquired during the Pulse Check. Similarly, referral to the Wellhouse program was another tool of EHC's to strengthen the IS department. None of these activities has the appearance of facially neutral harassment, as claimed by plaintiff.

Plaintiff next argues that his change of status from 'director' to 'manager' was discriminatory because it occurred immediately after plaintiff lodged his initial set of internal discrimination claims in 2000. This Court agrees with the Magistrate Judge that the change in job titles affected similarly situated Caucasians and had no impact on plaintiff's job duties or salary. Accordingly, the change of status does not constitute an instance of racial harassment.

Plaintiff then argues that he was discriminated against through Emory IS and WCI's denial of supporting office staff, through the sabotage of plaintiff's hiring of an African American by Cantrell and Murdock, and by the denial of plaintiff's request to attend a work-related conference. Again, the Court agrees with the Magistrate Judge that each of these decisions falls within "the very heart of an employer's business judgment." *Davis*, 245 F.3d at 1243.

Similarly, plaintiff's claims of racial harassment due to the denial of his promotion application for the CIO position are not persuasive because plaintiff lacked the qualifications for the position. *See infra* pp. 29-31.

Next, plaintiff claims racial harassment due to WCI's failure to classify him as a full-time employee and to assign him any direct reports at WCI. Although plaintiff was not assigned any direct reports and was not classified as a full-time employee, plaintiff provides no evidence that this occurred because of his race. Similarly, plaintiff is the only source of speculation that WCI's failure to assign plaintiff comparable office space to other all-White WCI Directors was based on race. Further, plaintiff ultimately did receive office space in WCI Building B after complaining to WCI's Chief Executive Officer.

Plaintiff also contends that WCI's failure to award pay raises to plaintiff comparable to those awarded to other employees constituted evidence of racial harassment. However, this claim is meritless because plaintiff was not similarly situated to other individuals whom plaintiff specified for comparison. *See infra* pp. 26-29.

Plaintiff then alleges racial harassment based on "the failure to provide Plaintiff with a list of available job openings, and/or allowing Plaintiff to continue to perform work for the same period of time before the effective date of the termination as was extended to the white charge-back employees under Cantrell's

supervision" and "the failure to reabsorb Plaintiff back into the Emory IS department as was done for other white Emory IS charge-back employees." (Pl.'s Objection to R&R, p. 14.) However, the material facts which plaintiff cites for the former objection only discuss his application and rejection for the position of CIO at Emory and the material facts which plaintiff cites for his latter objection make no showing that the failure to reabsorb plaintiff into the Emory IS department was based on race. Finally, plaintiff's claim that his termination of employment constituted racial harassment is contradicted by the fact that defendants offered legitimate non-pretextual reasons for that employment decision. *See infra* pp. 18-26.

Therefore, even though plaintiff is able to show a number of employment practices that may have been harassing to him as an individual, he fails to make a prima facie case for racial harassment because he offers no showing that "the harassment was based on his protected characteristic." *Hulsey*, 367 F.3d at 1244. Accordingly, the Court adopts the Magistrate Judge's recommendation to grant summary judgment on plaintiff's discriminatory harassment claim.

(2) Termination Based on Race Claim

Both Title VII and § 1981 prohibit an employer from discriminating against an employee because of that employee's race. 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 1981(a). Where plaintiff attempts to establish a case of individual disparate treatment based on

circumstantial evidence, the burden shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), applies. The plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802-04. Once a *prima facie* case is established, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-04. If the employer does so, the presumption is eliminated, and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. At all times, the plaintiff retains the ultimate burden of persuading the finder of fact that the defendant acted with discriminatory intent. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The elements for a prima facie case of discriminatory termination are that: (1) the plaintiff is a member of a protected class, (2) the defendant subjected the plaintiff to an adverse employment action, (3) the plaintiff was qualified for the current position or another available position with the defendant, and (4) the defendant in taking the adverse action intended to discriminate against the plaintiff because of the plaintiff's race. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990). In order to establish the defendant's discriminatory intent under the fourth factor, the plaintiff must put forward evidence that could lead a

finder of fact to conclude that (a) the defendant had consciously refused to consider retaining the plaintiff because of the plaintiff's race, or (b) the defendant regarded the plaintiff's race as a negative factor in such consideration. *Allison v. W. Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982).

The Magistrate Judge found that because plaintiff admitted that he had no evidence that defendants considered his race in making the decision to eliminate his position and relied only upon his own statements and the statements of other third parties with no firsthand knowledge of the decision, plaintiff failed to make out a prima facie case of wrongful termination. Similarly, the Magistrate Judge found that WCI's transfer of plaintiff's remaining job functions to two Caucasian employees did not create a genuine issue of material fact regarding the defendants' intent to unlawfully discriminate.

Plaintiff first objects to the standard used to decide the wrongful termination claim. In place of the fourth prong of the *McDonnell Douglas* test, plaintiff argues that he must "demonstrate that other similarly situated employees who were not members of the protected class were treated more favorably." *Michas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 693 (7th Cir. 2000). Further, plaintiff argues that when a terminated employee's responsibilities are absorbed by existing employees, the relevant inquiry is whether plaintiff was terminated amid circumstances that suggest unlawful discrimination. *Yates v. Rexton, Inc.*, 267 F.3d 793, 799 (8th Cir. 2001).

Appendix B

Plaintiff argues that the circumstances surrounding his termination suggest unlawful discrimination. First, plaintiff claims that Murdock quickly elevated Hubbard, a Caucasian, for the purpose of preparing her for plaintiff's position. Plaintiff claims that Murdock deliberately sought to replace plaintiff, an African-American, with Hubbard because she was Caucasian. However, this assertion is a conclusory allegation unsupported by citation to any evidence.

Second, plaintiff argues that during his termination meeting with defendants, Cantrell and Murdock noted several times that the termination was "not about performance." While Cantrell and Murdock would not dispute this assertion, it was never offered as the basis for plaintiffs termination. Accordingly, it does not create a genuine issue of material fact.

Third, plaintiff alleges that he was denied reabsorption by Cantrell after the elimination of his charge-back position at WCI. The failure to allow reabsorption in itself, however, is insufficient to constitute evidence of racial discrimination. "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1187 (11th Cir. 1984). Further, plaintiff has not established that he was similarly situated to other WCI chargeback employees who were subsequently reabsorbed after their positions were eliminated; accordingly, there is no basis for finding impermissible race discrimination.

Finally, plaintiff claims that defendants' assertions of budgetary or financial distress at WCI were pretextual because the GCI project was not suffering from budget problems. However, as the R&R points out, WCI in general and the Woodruff account fund from which plaintiff's salary was paid were experiencing budget problems at the time of plaintiff's termination. Thus, the Magistrate Judge correctly declined to review defendants' budget allocations.

Because defendants offer legitimate non-discriminatory reasons for dismissal, namely (1) that the Genesys SI project was complete and in production support mode; and (2) further Genesys SI expansion across EHC had not been funded; and because none of plaintiff's budgetary measurements show these claims to be pretextual, plaintiff fails to create a genuine issue of material fact concerning his wrongful termination claim. Therefore, the Court adopts the Magistrate Judge's recommendation to grant summary judgment on plaintiff's wrongful termination claim.

(3) Retaliatory Termination

Plaintiff next states a cause of action for retaliatory termination under Title VII and § 1981. Both Title VII and § 1981 prohibit employers from taking adverse employment actions against employees in retaliation for their opposition to discriminatory practices prohibited by the statutes. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1954-55, 1959 (2008). To establish a prima facie case of retaliation, plaintiff must prove that (1) he

engaged in statutorily protected activity, (2) he suffered a materially adverse action, and (3) a causal connection exists between the two. *See Butler v. Ala. Dep't of Trans.*, 536 F.3d 1209, 1212-13 (11th Cir. 2008). Protected activity can take one of two forms: (1) opposing unlawful discrimination (the opposition clause), or (2) making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing regarding discrimination (the participation clause). *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1350 (11th Cir. 1999). If a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008). If the employer meets its burden, then the plaintiff must show that the employer's proffered reason is mere pretext for retaliation. *Id.*

In her R&R, the Magistrate Judge determined that plaintiff was unable to prove that defendants' proffered reasons for his termination were a pretext for unlawful retaliation. The Magistrate Judge stated that plaintiff's claim that defendant offered two separate rationales for the termination was inaccurate and that defendants' proffered reason for the termination was, in fact, consistent with Murdock's initial explanation at the time of his request to the HR Department.

Plaintiff objects that he engaged in protected activity on March 31, 2005, when he complained to Murdock and Cantrell during his mid-point review that

they were discriminating against him by treating him differently than his Director peers, refusing him resources and then complaining about projects' incompleteness, and holding him to a higher standard of performance than his WCI peers. Plaintiff argues that within one week of his complaint, Murdock asked Dr. Andre Rogatko to withdraw plaintiff's appointment as Co-Director of the Data Management component of the Based/Data Management Core. Additionally, plaintiff claims that on the following day Cantrell and Murdock requested to the EHC-HR that plaintiff's position be eliminated. Plaintiff claims that the temporal proximity between plaintiff's complaint and Murdock and Cantrell's subsequent actions establishes a causal connection between the two.

Plaintiff seeks to establish that the stated reasons for plaintiff's termination were pretextual by showing that the supposed budgetary deficits in the Woodruff Fund from which plaintiff drew his salary never existed.

Even though plaintiff establishes that the Woodruff Fund was running a surplus in net revenue at the time plaintiff was fired, plaintiff fails to establish pretext because the fact that the Woodruff Fund was running a budget surplus in no way undermines the stated reasons for plaintiff's termination, i.e., that the "Genesys SI project [was] complete and in production support mode; and . . . [f]urther Genesys SI expansion across EHC ha[d] not been funded." (Murdock Depo. Ex. 42.) Neither of defendants' proffered reasons at the time of plaintiff's termination was dependent upon a finding

that the Woodruff Fund was running a budget deficit. Even though defendants subsequently referenced the fact that "budget deficits were enormous" as one of four reasons supporting Murdock's decision to terminate plaintiff (Mem. of Law in Supp. of Def.'s Mot. for Summ. J., p. 16), defendants' post hoc explanation for the termination is secondary to the stated reasons provided at the time of the termination. Further, WCI was running a substantial deficit at the time of plaintiff's termination, forcing defendants to make tough budgeting decisions. (Murdock Depo. Ex. 54.)

Because plaintiff cannot prove that defendant's termination decision was a pretext for unlawful retaliation, this Court adopts the Magistrate Judge's recommendation to grant summary judgment on plaintiff's retaliatory termination claim.

(4) Wage Discrimination

Plaintiff's fourth claim alleges that plaintiff was subject to wage discrimination on account of his race. Employers are prohibited from discriminating against their employees with regard to wages because of their race under Title VII and § 1981(a). 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 1981(a).

A prima facie case of wage discrimination may be established either through direct evidence of discriminatory intent or through circumstantial evidence capable of supporting an inference of intentional discrimination. *Carter v. Three Springs*

Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998). To establish a prima facie case using circumstantial evidence, plaintiff must produce evidence that (1) he belongs to a protected class; (2) he received low wages; (3) similarly situated comparators outside his protected class received higher compensation; and (4) he was qualified to receive the higher wage. *Cooper v. S. Co.*, 390 F.3d 695, 734-35 (11th Cir. 2004).

The Magistrate Judge's R&R found that plaintiff was not similarly situated to his chosen comparators, Michael Graiser and Cynthia Hubbard, because plaintiff was earning $125,652.80 at the time of his termination while Graiser was earning $73,300 and Hubbard was earning $101,863.92. The R&R found that plaintiff's attempt to compare the raises received by these employees would not satisfy the prima facie requirement of "similarly situated comparators outside the protected class [who] received *higher compensation.*" *Cooper*, 390 F.3d at 735 (emphasis added).

Plaintiff objects that the Magistrate Judge incorrectly applied the law in determining that pay increases could not serve as a basis for a wage discrimination claim. Plaintiff argues that the Supreme Court has read Title VII to mean that "the phrase terms, conditions or privileges of employment . . . evidences a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Nat. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) ((quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Plaintiff adds that race

discrimination in pay-increases have been analyzed under the McDonnell Douglas framework in the Eleventh Circuit in *Gillis v. Ga. Dep't of Corrs.*, 411 U.S. 792, 802 (1973).

In *Gillis*, the Eleventh Circuit noted that Title VII specifically mentions compensation, making it "unlawful for an employer to discriminate against an individual with respect to her compensation on the basis of her race." *Gillis*, 400 F.3d at 887. Accordingly, the Eleventh Circuit concluded that "an evaluation that directly disentitles an employee to a *raise* of any significance is an adverse employment action under Title VII." *Id.* at 887. Of the three cases cited by the Magistrate Judge in the R&R, only one is an Eleventh Circuit opinion. The Eleventh Circuit's discussion of wage discrimination claims in *Cooper* does not appear to preclude a claim of wage discrimination based upon disparities in raises. Thus, the Court disagrees with the R&R's determination that disparate pay increases cannot satisfy the prima facie requirement of a wage discrimination claim in the Eleventh Circuit.

Nonetheless, plaintiff still fails to make a prima facie case of wage discrimination because he fails to show that his comparators are "similarly situated." Plaintiff alleges that in 2005, Hubbard had received an annualized pay increase of 13% while Graiser received an annualized salary increase of 45%. Conversely, plaintiff consistently received annual cost of living increases of 3% to 4%. Despite this disparity, the fact that plaintiff, Graiser, and Hubbard each had different job titles, different job

responsibilities, and different base salaries precludes a finding that they were "similarly situated." *See MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 775 n.16 (11th Cir. 1991) ("In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him."). Accordingly, because plaintiff fails to make out a prima facie case, the Court adopts the Magistrate Judge's recommendation to grant summary judgment on this claim.

(5) Failure to Promote

Plaintiff's fifth claim alleges that defendants failed to promote him in violation of Title VII and § 1981. To establish a prima facie case for failure to promote, a plaintiff must demonstrate (1) membership in a protected class; (2) he was qualified for and applied for a position that the employer was seeking to fill; (3) despite qualifications, he was rejected; and (4) the position was filled with an individual outside the protected class. *Id.* at 768.

In his complaint, plaintiff alleges that he was discriminated against when he was passed over for the position of CIO at Emory University. Plaintiff claims he was qualified for the CIO position because of his experience as a change agent in information technology in complex organizational environments and his substantial responsibilities in his role as Director of Oncology Informatics.

Appendix B

In the R&R, the Magistrate Judge determined that plaintiff did not present evidence establishing that he met the job requirements but rather relied upon his own assertion that he "was qualified to be considered for the CIO position." (Pl.'s Br. of Law in Opp'n of Def.'s Mot. for Summ. J., p. 44.).

The Court agrees with the R&R that plaintiff could not establish that he met the qualifications for the CIO position. One of the stated criteria for the CIO position was "[a] track record that clearly supports both the capability and flexibility for operating effectively in a dynamic environment where the CIO must lead, as well as manage, change." (Pl.'s Depo., Def.'s Ex. 23, p. 11.) Martha Hauser, an executive search recruiter conducting the CIO search for Emory University, stated that "being the director of oncology informatics is not at a level, does not have the kind of management responsibility for people or a budget that would even minimally qualify [plaintiff] to compete with the candidates that they were actually looking at." (Hauser Depo. p. 114.) At the time this determination was made, Hauser was not even aware of plaintiff's race. (*Id.* p. 125.) Therefore, because plaintiff could not establish that "he was qualified for . . . a position that the employer was seeking to fill," *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 (11th Cir. 2005), the Court adopts the R&R's recommendation to grant summary judgment on this claim.

(6) Negligent Retention

Plaintiff's final claim alleges that defendants EHC and Emory University negligently retained plaintiff's supervisors, Cantrell, Murdock, and Palmich, even after plaintiff had notified them of his supervisors' discriminatory behavior. In Georgia, employers are required to "exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency." O.C.G.A. § 34-7-20. A claim of negligent retention requires the plaintiff to show that the employer knew or should have known of the employee's propensity to engage in the conduct that caused the plaintiff's injury. *Herron v. Morton*, 155 Fed. Appx. 423, 425-26 (11th Cir. 2005). A claim of negligent retention is derivative of the underlying claim. Therefore, if the underlying claim fails, the negligent retention claim must also be dismissed. *MARTA v. Mosley*, 280 Ga. App. 486, 489 (Ga. Ct. App. 2006).

Because the Court finds that all of plaintiff's underlying claims fail to survive summary judgment, plaintiff's negligent retention claim is also without merit. Thus, the Court adopts the Magistrate Judge's recommendation to grant summary judgment on this claim.

Summary

For the aforementioned reasons, the Court ADOPTS the Magistrate Judge's R & R [#81], GRANTS defendants' motion for summary judgment on

all claims asserted by plaintiff [#62], and DISMISSES plaintiff's complaint.

IT IS SO ORDERED, this 16th day of December, 2008.

s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

APPENDIX C — FINAL REPORT AND RECOMMENDATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION FILED NOVEMBER 10, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION

No. 1:06-CV-1699-MHS-GGB

LEROY HILL, JR.,

Plaintiff,

v.

EMORY UNIVERSITY; EMORY HEALTHCARE, INC., d/b/a Emory Winship Cancer Institute; DEDRA F. CANTRELL, a/k/a Dedra Frutchey; and SANDRA MURDOCK,

Defendants.

FINAL REPORT AND RECOMMENDATION AND ORDER

Plaintiff Leroy Hill, Jr. brings this employment discrimination action against his former employer and two of its employees. Plaintiff accuses Defendants of race discrimination, racial harassment, and retaliation in

violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and 42 U.S.C. § 1981 ("§ 1981"). He also brings a state law claim of negligent retention.

This action is presently before the Court on Defendants' Motion for Summary Judgment (Doc. 62), Defendants' Objection and Motion to Strike (Doc. 73), and Plaintiff's Motions for Leave to File Sur-Reply (Docs. 74, 75).

I. PLAINTIFF'S CLAIMS

The nature and extent of Plaintiff's claims are not entirely clear from his Complaint. As a consequence, Defendants appear to have interpreted the Complaint slightly differently from Plaintiff. In light of Plaintiff's arguments in response to Defendants' Motion for Summary Judgment, I construe Plaintiff's Complaint as containing the following claims: (1) racial harassment; (2) termination from employment based on race and (3) in retaliation for complaints about discrimination; (4) wage discrimination; and (5) negligent retention under Georgia law.[1] Unlike Defendants, I interpret Plaintiff's reliance on a myriad of relatively minor actions taken by Defendants during Plaintiff's employment as evidence in support of his harassment

1. Plaintiff's Complaint also contained claims for negligent hiring and intentional infliction of emotional distress. Plaintiff, however, has since abandoned these claims. (*See* Doc. 65 [Pl. Dep.] at 241-42).

claim and/or his remaining discrimination claims, not as separate claims based on each of the alleged actions.

II. FACTS

A. *Plaintiff is Hired*

In February 1998, Plaintiff, who is African American, was hired by Emory Healthcare ("EHC") as the Director of Data Services and Decisions Support in EHC's information services ("IS") department. (Pl. Dep. at 16; Doc. 69-5 [Pl. Decl.] at ¶ 3). Plaintiff reported directly to the Executive Director of Applications Services, Dedra Frutchey Cantrell, who in turn reported to Ron Palmich, the Chief Information Officer ("CIO"). (Pl. Dep. at 16). Cantrell and Palmich are both Caucasian. (Pl. Decl. at ¶ 3). EHC employed several others at the director level in the IS department, including Katherine Casey, Rick Aaron, Tim McCrary, Kathy Beck, Jack Morford, and Malcolm Barnes. (Doc. 70-7 [Barnes Dep.] at 19-20). All of these individuals are Caucasian. (*Id.* at 20).

As Director of Data Services, Plaintiff led a team of about fifteen employees consisting of application developers, database administrators, data administrators, and business analysts. (Pl. Decl. at ¶ 5; Pl. Dep. at 26-27). Plaintiff and others felt that the Data Services section was understaffed considering the large number of projects for which they were responsible. (*See* Doc. 70-3 [Douglas Dep.] at 43). The Data Services workgroup serviced customers across Emory Hospital,

Crawford Long Hospital, the Emory Clinic, and Wesley Woods. (Pl. Dep. at 18). The workgroup also managed Data Warehouse, Bone Marrow Transplant, Infection Control and Transplant Services applications; provided database support for Cerner Clinical Data Repository, Peoplesoft and Medical Records; conducted strategic planning; and developed and managed budgets approaching $1 million dollars. (Doc. 1 [Compl.] & Doc. 2 [Ans.] at ¶ 18; Pl. Dep. at 19). Data warehousing is a technology that places information in a common database through which users can analyze data. (Pl. Dep. at 19-20, 23). Shortly after Plaintiff's hire, Cantrell and Palmich asked Plaintiff to review an on-going Transactional Systems, Inc.'s ("TSI") managed care financial application project that was at the time assigned to the Clinical Application workgroup under the leadership of Catherine Casey. (Pl. Decl. at ¶ 7; Pl. Dep. at 259-61). Palmich and Cantrell informed Plaintiff that Casey did not have the skills needed to successfully implement the TSI project. (Pl. Decl. at ¶ 8). After Plaintiff delivered his recommendations for project improvement and more efficient execution, he was asked to take over the project from Casey but was not provided any additional resources. (*Id.*). In Plaintiff's estimation, effective implementation of the TSI project required between six and eight full-time employees ("FTEs"). (*Id.*). Nonetheless, Plaintiff successfully implemented the TSI application, within budget and on schedule, with the staff he had available. (Compl. & Ans. at ¶ 19).

Appendix C

B. *Plaintiffs Performance Evaluations*

Plaintiff received his first performance evaluation on August 10, 1998, approximately six months after his employment began. The evaluation included high praises from his departmental peers, who contributed to the evaluation. (Doc. 70-13 [Cantrell Dep.] at 394 [Ex. 11 to Cantrell Dep.]). Cantrell commented that Plaintiff "interacts well with his staff, his peers, his management and his clients. It has indeed been my pleasure to bring Leroy on board and to work with him on a daily basis!" (*Id.* at 395).

On April 5, 1999, Plaintiff received his first annual performance review and was rated very highly by Cantrell in every review category. Cantrell commented:

> Leroy brought a wealth of knowledge to the data services workgroup. He takes the time to teach and mentor his staff. He works well [with] Directors and our clients. He maintains a positive attitude [and] is always professional in his approach. He worked diligently to meet his 6 mo[nth] goals [and] objectives. He did a great job [with] budget planning for next year. It is indeed my pleasure to have Leroy on staff.

(April 5, 1999 Performance Review, Plaintiff's Ex. 3 to Pl. Dep.). That same year, Plaintiff received an award from his employer for Best Return on Investment. (Compl. & Ans. ¶ 19). Plaintiff also received positive

performance evaluations in 2000 and 2001. (Doc. 70-13 at 410 [Ex. 13 to Cantrell Dep.] and 414 [Ex. 14 to Cantrell Dep.]).

C. *Complaints about Plaintiff's Management Skills*

In February 2000, Palmich asked Cantrell to assist him in conducting what he called a "Pulse Check" in the IS department. (Doc 62-3 [Cantrell Decl.] at ¶ 7). During the Pulse Check, several employees under Plaintiff's supervision complained to Cantrell about Plaintiff's leadership skills. (*Id.*). They also reported that Plaintiff did not listen or respond to concerns they raised, that he failed to take action to solve problems, that he failed to set priorities, that he would force-fit tools or models that the staff found confusing and frustrating, that he did not fairly distribute work among the staff, and that he lacked vision and strategy. (*Id.*). Around the same time, a member of Plaintiff's workgroup, Bruce Douglas, requested a transfer out of the IS department. (*Id.*) Two other members of Plaintiff's team – Nancy Carter and Nina Gangadharan – reported that they were considering leaving the IS department because of Plaintiff. (*Id.*).

On January 25, 2000, Douglas informed Plaintiff that he wanted to transfer out of the IS department so that he could be closer to healthcare operations and because of the lack of new technical challenges in his current position. (Pl. Decl. at ¶¶ 13-14; Douglas Dep. at 54). Douglas also complained that his workgroup was not

staffed with enough or sufficiently skilled people to complete the required work. (Pl. Dep. at 76; Pl. Decl. at ¶ 13).

On January 26, Palmich and Cantrell met with Plaintiff and Douglas to discuss the reasons for Douglas's transfer request. (Pl. Decl. at ¶ 14). Douglas repeated the comments he had made to Plaintiff about his desire to transfer and concern about insufficient staff. (*Id.*). Cantrell and Palmich instructed Plaintiff to include in his fiscal year 2001 budget request a request for two additional FTEs. (Cantrell Dep. at 113-14). Plaintiff did make the budget request, but he received no additional FTEs. (*Id.*).

After the Pulse Check, Cantrell met separately with Douglas and asked if he was dissatisfied with Plaintiff's leadership skills. (Cantrell Decl. at ¶ 8). Douglas confirmed that he was and also commented that working for Plaintiff was like being in the movie "Groundhog Day," where every day is an exact repetition of the day before and nothing is accomplished. (*Id.*; Cantrell Dep. at 149; Douglas Dep. at 37, 57, 58, 61). Douglas also reported to Cantrell that he believed that most of the Data Services group shared his opinion of Plaintiff and that he would not return to the group as long as Plaintiff was the manager. (Cantrell Decl. at ¶ 8; Cantrell Dep. at 149; Douglas Dep. at 37, 57, 58, 61, 62, 68, 69).

Around March 1, 2000, Cantrell and Palmich met with Plaintiff regarding the performance problems that were mentioned by his employees during the Pulse

Check. (Summary of 3/1/00 Meeting Re: Work Performance Issues, Defendants' Ex. 5 to Pl. Dep.; Cantrell Dep. at 184-85). After the meeting, Cantrell and Palmich issued Plaintiff a written counseling regarding the performance problems. Summary of 3/1/00 Meeting Re: Work Performance Issues, Defendants' Ex. 5 to Pl. Dep.; Cantrell Dep. at 185). The memorandum warned Plaintiff that "these are serious leadership performance deficiencies and if not corrected immediately could result in termination." (Summary of 3/1/00 Meeting Re: Work Performance Issues, Defendants' Ex. 5 to Pl. Dep.). After Plaintiff received the written counseling, he worked with Cantrell to develop a written action plan to address the performance issues. (Action Plan, Defendants' Ex. 6 to Pl. Dep.; Re.: Updated Action Plan, Defendants' Ex. 7 to Pl. Dep.).

During the process of developing the written action plan, Plaintiff and Cantrell consulted with EHC's Human Resources ("HR") department. (Pl. Dep. at 126; Cantrell Dep. at 163-64). The HR department recommended that Plaintiff's group participate in a dialogue facilitated by Emory's faculty and staff assistance program, "Wellhouse." (Cantrell Dep. at 163-64; Doc. 62-5 [Gomes Decl.] at ¶¶ 2-3). Wellhouse offered a program that encouraged employees to air frustrations and assess interpersonal dynamics. (Gomes Decl. at ¶ 3). In March and April 2000, Plaintiff's group participated in the program. (Pl. Dep. at 130-133; Pl. Decl. at ¶ 17). Other EHC employees had complained about their managers or transferred out of other work groups, but their managers had not been required to participate in the Wellhouse program. (Cantrell Dep. at 162).

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D. Plaintiff's Complaints About Discrimination

On March 22, 2000, Plaintiff complained to Larry Hodges, HR Director for EHC, that the discipline he received from Cantrell and Palmich was unfair and differed from that received by other managers. (Pl. Decl. at ¶ 18). Plaintiff also complained to Emory's Equal Opportunity Program Administrator, Bob Etheridge, about the discipline. (*Id.* at ¶ 19). After these complaints, Plaintiff and Cantrell agreed to move forward with a "clean slate." (Cantrell Dep. at 254-55).

On October 17, 2000, Plaintiff complained to Dana Bible, an HR employee for EHC, that African American job applicants were interviewed by a greater number of employees than Caucasian applicants. (*Id.* at 327-28). Plaintiff also complained that he was subjected to race discrimination, specifically in being required to participate in the Wellhouse program. (Doc. 70-13 at 496 [Ex. 38 to Cantrell Dep.]). Following this complaint, Hodges investigated Plaintiff's allegation regarding the number of interviews for job applicants and determined that no race-based disparity existed. (Doc. 62-4 [Hodges Decl.] at ¶ 5). Hodges conducted a follow-up meeting with Plaintiff in which he explained the results of his investigation. (*Id.*).

E. Plaintiff's Job Title Changes

Effective July 31, 2000, the HR department and Palmich changed the job titles of several directors who were direct reports of Cantrell to more accurately reflect

their roles in the department. (*Id.* at 80-81). The "directors" were reclassified as "managers." (*Id.*). Plaintiff was one of the directors affected by this change in job title; his title changed from "Director of Data Services and Decision Support" to "Manager of Data Applications." (Emory Hospitals Human Resources Request for Change/Action, Defendants' Ex. 20 to Pl. Dep.). This change in job title did not affect Plaintiff's job duties or salary. (*Id.* at 159).

F. Plaintiff Becomes a Director for WCI

In March 2001, Cantrell and Palmich asked Plaintiff to apply for the position of Director of Oncology Informatics at the Emory Winship Cancer Institute ("WCI"). (Pl. Dep. at 163). Plaintiff applied for and was given the position, which provided him with a 10% pay increase. (*Id.* at 163-64). Plaintiff's primary role in his new position was project manager for a high-profile informatics project known as GeneSys SI ("GSI"). (*Id.* at 48; Murdock Decl. at ¶ 2). GSI was a system that combined information from multiple sources to allow users to compare data in an effort to determine the causes of a particular type of cancer, the best methods of treatment, and the most effective means of prevention. (Pl. Dep. at 56-57). Plaintiff also had several other job duties not related to GSI, including providing input on technology solutions for grant requests. (*Id.* at 51).

Administratively, Plaintiff remained an EHC employee. (Cantrell Dep. at 296). His salary was "charged back" to WCI, meaning that WCI paid

Plaintiff's salary while he remained an employee of EHC. (*Id.*). As a result, Plaintiff was jointly supervised by Defendants Cantrell and Sandra Murdock, WCI's Chief Operating Officer. (Pl. Dep. at 46-47).

Plaintiff was not informed prior to his acceptance of the position that he would remain an EHC employee and his salary would be charged back. (Pl. Dep. at 167). In May 2001, Plaintiff confronted Cantrell and Palmich about allegations made by Patina Sidner, an African American WCI project management staff member, that Plaintiff's promotion was a ploy to "get rid of Plaintiff." (Pl. Decl. at ¶ 32). Cantrell and Palmich denied the allegation. (*Id.*).

Following his new assignment, Plaintiff's office was relocated to the second floor of the EHC building. (*Id.* at ¶ 29). Plaintiff requested office space from WCI but was told that no space was available at that time. (*Id.* at ¶¶ 46-47). In July 2003, WCI Building C opened, and Plaintiff's peers moved into private offices in that building. (*Id.* at ¶ 48). Plaintiff again requested office space from WCI, but his request was denied. (*Id.*). In October 2003, Plaintiff learned of plans to return his office to the fourth floor of the EHC building. (*Id.* at ¶ 49). Unhappy with this plan, he complained about his office space situation to the Chief Executive Officer of EHC. (*Id.* at ¶ 53). The next day, he received office space in WCI Building B. (*Id.*).

Despite the number of assignments given to Plaintiff, he was the only WCI director who had no direct

reports or staff. (Pl. Decl. at ¶ 55). Plaintiff sought new FTEs on two occasions in June 2004, but both proposals were rejected. (*Id.* at ¶¶ 55-56). In December 2001, Plaintiff received permission to hire an employee for the position of Business Analyst III. (Pl. Decl. ¶ 34). Plaintiff conducted the hiring process and made an offer to an African American applicant. (*Id.* at ¶¶ 35, 37). Cantrell and Murdock rescinded the offer made by Plaintiff and ultimately hired a Caucasian applicant, Cindy Hubbard. (*Id.* at ¶¶ 38, 41).

In November 2002, Plaintiff requested funding to attend a conference related to the GSI project. (*Id.* at ¶ 45). Murdock rejected Plaintiff's request, and Plaintiff paid his own way to the conference. (*Id.*). Around the same time, Murdock informed Plaintiff that she approved Hubbard's request for funding to attend a work-related conference in California. (*Id.*).

G. *Salaries*

During the 2004 fiscal year, Plaintiff received a salary of $119,018. (Doc. 70-12 [Simons Dep.] at 64). Plaintiff's annual salary as of his termination on May 9, 2005 was $125,652.80. (Doc. 70-16 [Murdock Dep.] at 257). Beginning in June 2004, Hubbard received an annual salary of $92,393.64. (Doc. 70-10 [Hubbard Dep.] at 117-18). In December 2004, Hubbard's salary increased to $97,013.32. (*Id.* at 118). Hubbard was promoted to Director of Information Technology Operations in March 2005, and her salary increased to $101,863.92. (*Id.* at 120).

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Michael Graiser ("Graiser") is a Caucasian who was employed by WCI to understand the needs of physicians and utilize the existing systems within WCI to provide solutions to their needs. (Doc. 70-9 [Graiser Dep.] at 17; Pl. Dep. at 197). Graiser received a salary of $61,800 from September 2004 to March 2005. (Graiser Dep. at 100, 104). In March 2005, Graiser's salary increased to $75,600. (*Id.* at 104).

H. *Plaintiff Applies for CIO Position*

In 2005, Emory University sought candidates for a position with the title "Vice President for Information Technology/Chief Information Officer" ("CIO"). (Doc. 70-14 [Hauser Dep.] at 18-19). It retained an executive search firm to seek qualified candidates for the position. (*Id.* at 29). Emory instructed the search firm to seek an individual with (1) previous CIO experience, preferably at another academic institution; (2) previous management experience at an organization with a similar budget and number of employees; and (3) a relevant graduate degree. (*Id.* at 56, 61, 114, 117). The search firm received expressions of interest from around 150 individuals. (*Id.* at 83). The search firm evaluated the candidates and presented the most qualified ones to an internal search committee with final decisionmaking authority. (*Id.* at 84-85).

On March 22, 2005, Plaintiff applied for the CIO position. (*Id.* at 103). A recruiter employed by the executive search firm evaluated Plaintiff's background and determined that he lacked the minimum

qualifications for the position. (*Id.* at 113-14). At the time, the recruiter did not know Plaintiff's race. (*Id.* at 125). The recruiter informed Plaintiff that his application was rejected. (*Id.* at 113, Ex. 13). She did not submit his name to the search committee. (Doc. 70-14 at 186 [Ex. 15 to Hauser Dep.]).

I. *Plaintiff's Termination*

In 2004, GSI moved from its original developmental phase into a maintenance phase, which required less oversight by Plaintiff. (Doc. 62-6 [Murdock Decl.] at ¶ 5). Also, GSI began to suffer from budget problems as its spending far exceeded its revenue. (*Id.* at ¶ 7). Due to the budget problems, funding for GSI – including Plaintiff's salary – was thereafter provided by the Woodruff Fund, Inc., a charitable foundation account. (*Id.*; Simons Dep. at 64).

Plaintiff met with Cantrell and Murdock on March 31, 2005 for a mid-year evaluation. (Pl. Dep. at 215). During the meeting, Plaintiff told Cantrell and Murdock that "they were discriminating and treating [him] differently from [his] Director peers . . . by refusing [him] resources and then complaining about projects [sic] incompleteness." (Pl. Decl. at ¶ 62).

Shortly thereafter, Murdock planned the fiscal year 2006 budget, in which she implemented various budget cuts. (Murdock Decl. at ¶ 9). During this process, she considered eliminating Plaintiff's position. (*Id.*). She then discussed the elimination of Plaintiff's position with

Cantrell. (*Id.*). Murdock and Cantrell agreed to terminate Plaintiff's employment and, on April 6, 2005, formally requested the personnel action from the HR department. (Doc. 70-16 at 65 [Ex. 42 to Murdock's Dep.]). The HR department approved the personnel action request on May 4, 2005. (*Id.* at ¶ 10). Murdock and Cantrell then scheduled a termination meeting with Plaintiff for May 9, 2005 at 4:30 p.m. and prepared a termination letter to give to him at the meeting. (*Id.*).

On May 9, at around 1 p.m., Plaintiff complained of discrimination to an employee with the Emory Equal Opportunity Programs office. (Pl. Decl. at ¶ 67; Doc. 70-8 [Hopewell Dep.] at 58-59). Upon returning to his office, Plaintiff telephoned Murdock to inform her of his complaint. (Pl. Decl. at ¶ 67). At 4:30 p.m., Murdock and Cantrell met with Plaintiff to inform him of the decision to eliminate his position. (*Id.*). They encouraged Plaintiff to apply for any of the open positions within Emory. (Cantrell Decl. at ¶ 17; Murdock Decl. at ¶ 10). Plaintiff, however, never applied for an open position at any Emory entity following his termination. (Pl. Dep. at 232).

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on July 20, 2005, alleging race discrimination and retaliation. (Notice of Charge of Discrimination, Defendants' Ex. 8 to Pl. Dep.). The EEOC issued Plaintiff a notice of right to sue on March 31, 2006. (Dismissal and Notice of Rights, Defendants' Ex. 29 to Pl. Dep.). This lawsuit followed.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Id.*

IV. DISCUSSION

A. *Racial Harassment*

Title VII and § 1981 prohibit racial harassment that is sufficiently severe and pervasive to alter the terms and conditions of employment and alter the victim's working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see Jackson v. Motel 6 Multipurpose*, 130 F.3d 999, 1008 n.17 (11th Cir. 1997) (reading § 1981, as amended by the Civil Rights Act of 1991, to encompass claims for racially hostile work environment). To establish a claim of racial harassment, Plaintiff must show that (1) he belongs to a protected group; (2) he has suffered unwelcome harassment;

(3) the harassment was based on his protected characteristic; (4) the harassment was severe or pervasive; and (5) a basis for holding the employer liable exists. *See Hulsey v. Pride Rests.*, 367 F.3d 1238, 1244 (11th Cir. 2004) (discussing sexual harassment).[2]

Here, Defendants argue that Plaintiff cannot show that he was harassed because of his race as he admits that he was not subjected to racial slurs or comments. (Doc. 62-2 at 41-43). In response, Plaintiff does not explicitly address Defendants' argument regarding the absence of racial slurs. In reply, Defendants contend that Plaintiff has abandoned his racial harassment claim. (Doc. 71 at 26). Although Plaintiff can be faulted for failing to address Defendants' argument directly, he plainly has not abandoned his racial harassment claim. Indeed, a portion of his brief is devoted to this claim. (*See* Doc. 69-2 at 46-47). *Cf. Bute v. Schuller Int'l Inc.*, 998 F. Supp. 1473, 1477 (N.D. Ga. 1998) (finding Americans with Disabilities Act retaliation claim abandoned where plaintiff failed to respond to defendant's argument that claim was barred due to plaintiff's failure to pursue administrative remedies, *and where plaintiff otherwise failed to address the claim).*

At best, Defendants could argue that Plaintiff's failure to address their specific argument requires

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2. The standards applicable to racial harassment are the same as those used for sexual harassment. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002).

acceptance of that argument as unopposed. However, because the argument is not supported by any authority (*see* Doc. 62-2 at 43) and is plainly incorrect, I decline to rely on it to find in Defendants' favor. A racial harassment claim may be based on conduct that is not explicitly of a racial nature. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("The critical issue, Title VII's text indicates, is whether members of one [race] are exposed to disadvantageous terms or conditions of employment to which members of [another race] are not exposed."). Plaintiff is merely required to show that the mistreatment was directed at him *because of* his race. *Id.* at 81.

In an attempt to show that he was harassed because of his race, Plaintiff points to a myriad of facially-neutral actions taken by Defendants. (*See* Doc. 69-2 at 34-37, 46-47). These actions are listed below.

1. *Pulse Check, Written Counseling, and Wellhouse*

Defendants' Pulse Check revealed employee complaints about Plaintiff's leadership skills. (Cantrell Decl. at ¶ 7). In addition, concerns about Plaintiff's leadership led one of his employees to transfer. (*Id.* at ¶ 8). As a result of these concerns, Plaintiff received a written counseling that warned of possible termination. (Summary of 3/1/00 Meeting Re: Work Performance Issues, Defendants' Ex. 5 to Pl. Dep.). In addition, Plaintiff's group was referred to the Wellhouse program for a facilitated dialogue involving, in part, Plaintiff's management. (Pl. Dep. at 130-133).

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2. *Demotion in Job Title*

Pursuant to EHC's reclassification of job titles to more accurately reflect employees' roles, Plaintiff's job title was changed from a director to a manager. (Cantrell Dep. at 80-81). This reclassification also affected Caucasians whose titles were similarly changed from director to manager. (*Id.*). The reclassification did not affect Plaintiff's job duties or salary. (Pl. Dep. at 159).

3. *Office Accommodations*

Upon his promotion to Director of Oncology Informatics of WCI, Plaintiff was denied office space in a WCI building until he complained to the Chief Executive Officer of EHC. (Pl. Decl. at ¶ 53).

4. *Support Staff*

Throughout the course of his employment, Plaintiff was denied adequate support staff. For example, in 2000 he was instructed to request two additional FTEs, but his request was ultimately rejected during the budget process. (Cantrell Dep. at 113-14). During his assignment to WCI, Plaintiff was the only director with no direct reports or staff. (Compl. and Ans. at ¶ 46; Pl. Decl. at ¶ 155).

5. *Hiring Decision*

Plaintiff obtained authorization to hire a new employee for WCI, but the offer he made to an African

American candidate was rescinded and the position was ultimately filled by a Caucasian. (Pl. Decl. at ¶¶ 34-35, 37-38, 41).

6. *BRIITE Conference*

Murdock rejected Plaintiff's request for funding to attend a work-related conference but told him that she approved funding for a Caucasian employee to attend a work-related conference. (*Id.* at ¶ 61).

Plaintiff's complaints concern normal workplace decisions, which "strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets in response to shifting and competing market priorities." *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1243 (11th Cir. 2001). "We do not suggest that a change in work assignments can never by itself give rise to a Title VII claim.... In the vast majority of instances, however, we think an employee alleging a loss of prestige on account of a change in work assignments, without any tangible harm, will be outside the protection afforded by Congress in Title VII's anti-discrimination clause...." *Davis* at 1245; *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1234 (11th Cir. 2006) (finding that a reprimand and refusal to allow the plaintiff to sit on a stool while working as a cashier was not sufficiently adverse to constitute actionable retaliation). Plaintiff has not met his burden of showing that he suffered severe or pervasive harassment because of his race. I therefore recommend that Defendants' Motion for Summary Judgment on this claim be **GRANTED.**

Appendix C

B. *Termination Based on Race*

Title VII and § 1981 prohibit an employer from discriminating against an employee because of that employee's race.[3] 42 U.S.C. §2000e-2(a)(1); 42 U.S.C. § 1981(a). Where, as here, the plaintiff attempts to establish a case of individual disparate treatment based on circumstantial evidence, the burden shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973), applies. Plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. 792, 802-804; *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527-28 (11th Cir. 1997).

Once a *prima facie* case is established, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-04. If the employer does so, the presumption is eliminated, and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.* At all times, the plaintiff retains the ultimate burden of persuading

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3. In the employment context, the same substantive analysis applies to claims brought under § 1981 as to claims brought under Title VII of the Civil Rights Act of 1964. *Turner v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1060 (11th Cir. 1994); *Crawford v. Western Elec. Co.*, 745 F.2d 1373, 1376 (11th Cir. 1984).

the finder of fact that the defendant acted with discriminatory intent. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

1. *Prima Facie Case*

Here, Defendants eliminated Plaintiff's position and reassigned his remaining duties to at least two other employees. (Murdock Dep. at 271). Such action, although it involves only one position, constitutes a reduction in force. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1331 (11th Cir. 1998) (reduction in force involving elimination of one position); *Puckett v. McPhillips Shinbaum, LLP*, No. 2:06cv1148, 2008 WL 906569, *9 n.3 (M.D. Ala. March 31, 2008) ("An employer need not dismiss any particular number of employees, or terminate a set percentage of the work force, to institute a reduction of force.").

The traditional elements of a prima facie case for discriminatory termination are slightly modified in a reduction-in-force case because the plaintiff is rarely replaced by another employee.[4] Instead, the elements

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4. Plaintiff asserts that he was replaced by Hubbard, a Caucasian employee, because the two performed similar duties prior to his termination and she received most of his job duties upon his termination. (Doc. 69-2 at 37). An individual is not replaced, however, when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. *See, e.g., Minton v. Am.*

(Cont'd)

of the prima facie case are that (1) the plaintiff is a member of a protected class, (2) the defendant subjected the plaintiff to an adverse employment action, (3) the plaintiff was qualified for the current position or another available position with the defendant, and (4) the defendant in taking the adverse action intended to discriminate against the plaintiff because of the plaintiff's race.[5] *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990). To establish a defendant's discriminatory intent, the plaintiff must proffer evidence that could lead a fact finder to conclude that (a) the defendant had consciously refused to consider retaining the plaintiff because of the plaintiff's race, or (b) the defendant regarded the plaintiff's race as a negative factor in such consideration. *Allison v. W. Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982).

Here, it is undisputed that Plaintiff is a member of a protected class and was subjected to an adverse employment action. In regard to the third element of the prima facie case, the parties have not explicitly addressed whether Plaintiff was qualified for another

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(Cont'd)

Bankers Ins. Group, Inc., 61 Fed. Appx. 670, 670 (11th Cir. 2003) (finding that employee was not replaced when coworker merely absorbed some of plaintiff's duties).

5. As the Eleventh Circuit recently stated, "[c]ontrary to [defendant's] argument, the law of this circuit does not require the plaintiff prove that he was replaced by someone outside the protected class." *Padilla v. N. Broward Hosp. Dist.*, 270 Fed. Appx. 966, 971 n.4 (11th Cir. 2008).

position at the time of his termination.[6] Assuming arguendo that Plaintiff was qualified for another position, he must then show that Defendants terminated his employment with the intent to discriminate against him based on his race. Plaintiff admitted during his deposition that he has no evidence that Defendants considered his race in making the decision to eliminate his position. (Pl. Dep. at 227). His own opinions and conclusory statements to the contrary do not constitute evidence in the record regarding Defendants' intent, nor do the opinions and conclusory statements of third parties who have no firsthand knowledge of the subject matter. *See Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 951 (11th Cir. 2000).

Further, the fact that WCI transferred his remaining job functions to two Caucasian employees, without further evidence, does not create a genuine issue of material fact regarding the Defendants' intent to unlawfully discriminate. *See Padilla*, 270 Fed. App. at 972 (finding that the reassignment of Hispanic former employee's job duties to two Caucasian employees pursuant to a reduction in force did not create a genuine issue of material fact regarding the employer's intent to discriminate); *cf. Jameson v. Arrow Co.*, 75 F.3d 1528, 1532 (11th Cir. 1996) (finding in case not involving a

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6. The evidence in the record most directly relating to Plaintiff's qualifications for another position is that Cantrell and Murdock informed Plaintiff that his termination was not based on performance and that he should apply for any open positions within the organization. (Pl. Decl. at ¶ 67; Cantrell Decl. at ¶ 17; Murdock Decl. at ¶ 10).

reduction in force that employer's decision to hire an employee outside of the plaintiff's protected class, *coupled with* its decision not to hire the plaintiff, gave rise to a rebuttable inference of intent to discriminate). Plaintiff is therefore unable to establish a prima facie case on this claim.

2. *Pretext*

Even if Plaintiff could establish a prima face case, summary judgment on this claim is still appropriate because the record is devoid of evidence that the reason given for his termination was pretextual. Defendants have articulated a legitimate non-discriminatory reason for Plaintiff's termination – namely, that the GSI project experienced budget difficulties and had moved from a development phase into a maintenance phase, requiring less attention from Plaintiff. (Doc. 71 at 18). In response, Plaintiff presents several arguments that Defendants' proferred reason is pretext for race discrimination.

Plaintiff first argues that the GSI project was not suffering from budget problems. The evidence cited by Plaintiff, however, does not support this argument. The uncontradicted evidence shows that WCI in general, and the Woodruff account fund from which Plaintiff's salary was paid in particular, experienced budget problems at the time of Plaintiff's termination. (Doc. 70-14 at 25 [Ex. 10 to Murdock Dep.]; Doc. 70-16 at 94 [Ex. 53 to Murdock Dep.]). Plaintiff's argument amounts to an invitation for this court to second guess Defendants' allocation of its budget. Pursuant to binding precedent,

I decline to accept the invitation. *See Rowell v. BellSouth Corp.*, 433 F.3d 794, 798 (11th Cir. 2005) ("It is by now axiomatic that we cannot second-guess the business decisions of an employer.").

Plaintiff next argues that Defendants' reason is pretextual because he performed several functions not related to GSI. Defendants never contended, however, that Plaintiff worked solely on GSI. (*See* Doc. 62-2 at 14). Rather, Defendants stated, as has Plaintiff, that Plaintiff was heavily involved with the development of GSI. (Pl. Dep. at 269-70, Murdoch Decl. at ¶ 9). The fact that Plaintiff also performed other functions does not create a genuine issue of material fact regarding pretext.

Finally, Plaintiff argues that he was terminated because Defendant Murdock wanted to hire a Caucasian female. (Doc. 69-2 at 39). This conclusory allegation is not supported by a citation to evidence in the record and therefore fails to create a genuine issue of material fact.[7]

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7. It is unclear whether Plaintiff additionally argues that a co-worker's statement in 2001 calling his promotion a ruse is evidence of pretext. (Doc. 69-2 at 38). If Plaintiff so argues, the argument does not create a genuine issue of material fact regarding pretext because the co-worker's opinion is not based on evidence in the record. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) ("To survive summary judgment, the plaintiff must . . . present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext. Mere conclusory allegations and assertions will not suffice.").

Because Plaintiff fails to carry his burden of establishing a prima facie case and pretext, Defendants' Motion for Summary Judgment regarding this claim should be **GRANTED**.

C. *Retaliatory Termination*

Title VII and § 1981 prohibit employers from taking adverse employment actions against employees in retaliation for their opposition to discriminatory practices prohibited by the statutes. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1954-55, 1959, 170 L. Ed. 2d 864, 869, 875 (2008). To establish a prima facie case of retaliation, Plaintiff must prove that (1) he engaged in statutorily protected activity, (2) he suffered a materially adverse action, and (3) a causal connection exists between the two. *See Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1212-13 (11th Cir. 2008). Protected activity can take one of two forms: (1) opposing unlawful discrimination (the opposition clause), or (2) making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing regarding discrimination (the participation clause).[8] *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1350 (11th Cir. 1999).

If a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. *Goldsmith v. Bagby Elevator Co., Inc.*,

8. Defendants' Brief addresses only the participation clause. (*See* Doc. 62-2 at 44).

513 F.3d 1261, 1277 (11th Cir. 2008). If the employer meets its burden, then the plaintiff must show that the employer's proferred reason is mere pretext for retaliation. *Id.* (requiring the plaintiff to present sufficient evidence to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment action). Conclusory allegations, without more, are insufficient to show pretext. *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1073 (11th Cir. 1995). Instead, the plaintiff must meet the proferred reason "head on" and rebut it. *Springer v. Convergys Customer Mgmt. Group Inc.*, 509 F.3d 1344, 1350 (11th Cir. 2007).

Here, Plaintiff argues that he engaged in protected activity on two occasions.[9]

1. *March 31, 2005 Statement*

The first occasion was Plaintiff's statement to Cantrell and Murdock during his mid-year performance review on March 31, 2005 that "they were discriminating

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9. Plainly, Plaintiff's participation in EEOC proceedings related to this claim, although protected activity, cannot be used to establish a prima facie case because that activity occurred after Plaintiff's termination. In addition, the record indicates that Plaintiff opposed race discrimination in 2000. Because Plaintiff has not advanced arguments relating to these acts, they will not be considered. *See, e.g., Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) (finding claim abandoned where argument was not presented in initial response to motion for summary judgment).

against him." (Pl. Decl. at ¶ 62). Defendants argue that this statement is a sham designed to create a genuine issue of material fact regarding Plaintiff's retaliation claim. Although Defendants' argument likely has merit, I do not need to rely on it because Plaintiff is unable to prove that Defendants' proferred reason for the termination is a pretext for unlawful retaliation. As stated above, Defendants' proferred reason is that the GSI project experienced budget difficulties and had moved from a development phase into a maintenance phase, requiring less attention from Plaintiff. For this claim, Plaintiffs entire pretext argument is that Murdock initially provided two rationales that differ from Defendants' arguments in this case. (Doc. 69-2 at 48). As explained above, Defendants' proferred reason for the termination is consistent with Murdock's initial explanation. Plaintiff has not shown Defendants' reason is pretext for discrimination.

2. *May 9, 2005 Complaint*

The second occasion was Plaintiff's complaint on May 9, 2005, the day of his termination. It is undisputed that Cantrell and Murdock decided to terminate his employment on April 6, 2005, over one month prior to this complaint. As the termination decision was made prior to this complaint, there is no causal connection between the complaint and termination. *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999).

Because Plaintiff is unable to establish that he engaged in protected activity for which his employment was terminated, Defendants' Motion for Summary Judgment on this claim should be **GRANTED**.

D. *Wage Discrimination*

Title VII and § 1981 prohibit employers from discriminating against employees in regard to their wages because of their race.[10] 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 1981(a). A prima facie case of wage discrimination may be established either through direct evidence of discriminatory intent or, as is more often the case, through circumstantial evidence capable of supporting an inference of intentional discrimination. *See Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1018-19 (11th Cir. 1994) (discussing wage discrimination). In this case, I am unaware of any direct evidence establishing discriminatory intent. To establish a prima facie case using circumstantial evidence, Plaintiff must, at a minimum, produce evidence that (1) he belongs to a protected class; (2) he received low wages; (3) similarly situated comparators outside his protected class received *higher compensation;* and (4) he was qualified

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10. As stated above, in the employment context the same substantive analysis applies to claims brought under § 1981 as to claims brought under Title VII of the Civil Rights Act of 1964. *Turner v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1060 (11th Cir. 1994); *Crawford v. W. Elec. Co.*, 745 F.2d 1373, 1376 (11th Cir. 1984).

to receive the higher wage. *Cooper v. S. Co.*, 390 F.3d 695, 734-35 (11th Cir. 2004).

Plaintiff seeks to compare himself to two Caucasian employees, Graiser and Hubbard. (Doc. 69-2 at 41-43). Pretermitting any analysis of whether these employees are in fact similarly situated to Plaintiff, at the time of Plaintiff's discharge Graiser earned $73,300 and Hubbard earned $101,863.92. (Graiser Dep. at 104; Hubbard Dep. at 120). Plaintiff, who at the time of his termination earned $125,652.80, does not allege that either comparator received a higher salary. (*See* Doc. 69-2 at 41-43).

Rather than compare the salaries of these employees, Plaintiff instead attempts to rely on the *raise* the employees received as compared to his raise. (*Id.* at 41). This does not satisfy the prima facie requirement of a similarly situated employee outside Plaintiff's protected class who received higher compensation. *See Cooper*, 390 F.3d at 734-35; *Gilham v. Athens Land Trust, Inc.*, 510 F. Supp. 2d 1349, 1358 (M.D. Ga. 2007); *Johnson v. Univ. of Wisconsin - Eau Claire*, 70 F.3d 469, 478 (7th Cir. 1995) ("The fact that the margin between [the plaintiff] and [comparator]'s pay rates . . . decreased . . . does not constitute impermissible wage discrimination."). Plaintiff is therefore unable to establish a prima facie case of wage discrimination. Defendants' Motion for Summary Judgment regarding his wage discrimination claim should therefore be **GRANTED**.

Appendix C

E. *Failure to Promote*

Plaintiff also claims that Defendants failed to promote him in violation of Title VII and § 1981. This claim is also subject to the *McDonnell Douglas* method of proof. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th Cir. 2005). To establish a prima facie case of failure to promote, Plaintiff must show (1) membership in a protected class; (2) he was qualified for and applied for a position that the employer was seeking to fill; (3) despite qualifications, he was rejected; and (4) the position was filled with an individual outside the protected class. *Id.* at 768.

Plaintiff's failure to promote claim is based on his application for the position of CIO at Emory University in March 2005. (Doc. 69-2 at 43-45). Emory retained an executive search recruiter to help fill the position. It instructed her to seek an individual with (1) previous CIO experience, preferably at another academic institution; (2) previous management experience at an organization with a similar budget and number of employees; and (3) a relevant graduate degree. (Hauser Dep. at 56, 61, 114, 117). Plaintiff did not present evidence that he met these job qualifications, nor did he present evidence that the candidate selected for the CIO position failed to meet these qualifications. Plaintiff's bare assertion that "he was very competitive for the CIO position" does not constitute evidence on the record. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990) ("To survive summary judgment, the plaintiff must . . . present concrete

evidence in the form of specific facts. . . . Mere conclusory allegations and assertions will not suffice."). Because Plaintiff is unable to establish the second element of the prima facie case of race discrimination for a failure to promote claim, Defendants' Motion for Summary Judgment on this claim should be **GRANTED.**

F. *Negligent Retention*

Plaintiff also brings a state law claim for negligent retention. Georgia law requires employers to "exercise reasonable care in the selection of employees and not to retain them after knowledge of incompetency." O.C.G.A. § 34-7-20. A claim of negligent retention under Georgia law requires the plaintiff to show that the employer knew or should have known of the employee's propensity to engage in the conduct that caused the plaintiff's injury. *Herron v. Morton*, 155 Fed. Appx. 423, 425-26 (11th Cir. 2005). A claim of negligent retention is derivative of the underlying claim. Thus, if the underlying claim fails, the negligent retention claim must be dismissed. *MARTA v. Mosley*, 280 Ga. App. 486, 489, 634 S.E. 2d 466, 469 (2006). The statute of limitations for a negligent retention claim under Georgia law is two years. O.C.G.A. § 9-3-33; *Harris v. Fulton-Dekalb Hosp. Auth.*, 255 F. Supp. 2d 1347, 1359 (N.D. Ga. 2002) (finding that plaintiff's state law claims, including negligent retention, are barred by the two-year statute of limitations).

Plaintiff does not specify the harm upon which he bases his negligent retention claim. (Doc. 69-2 at 48-50).

Elsewhere in his brief, however, he complains that within the limitations period his employment was terminated as a result of race discrimination and retaliation. I recommended summary judgment on Plaintiff's underlying claims for wrongful termination based on race discrimination and retaliation. Defendants' Motion for Summary Judgment on Plaintiff's negligent retention claim should necessarily also be **GRANTED**.

V. DEFENDANTS' OBJECTION AND MOTION TO STRIKE

In addition to their Motion for Summary Judgment, Defendants also filed an Objection and Motion to Strike (Doc. 73) certain declarations and exhibits in support of Plaintiff's Summary Judgment Reply. As I have recommended that Defendants' Motion for Summary Judgment on each claim be granted, Defendants' Objection and Motion to Strike is **MOOT**.

VI. PLAINTIFF'S MOTIONS FOR LEAVE TO FILE SUR-REPLY

Plaintiff seeks to file a sur-reply to Defendants' Motion for Summary Judgment. In the sur-reply, Plaintiff intends to address (1) Defendants' arguments regarding continuing violations, (2) Defendants' allegation that Plaintiff has manufactured new evidence regarding his retaliation claim, and (3) the Eleventh Circuit's recent decision in *Crawford v. Carroll*. A sur-reply on the first point is unnecessary because, as stated above, I interpret Plaintiff's reliance on numerous

employment actions as support of his harassment and discrimination claims rather than as discrete employment actions. A sur-reply on the second point is unnecessary because I do not agree that Plaintiff manufactured new evidence. Finally, a sur-reply on the third point is unnecessary because further briefing regarding *Crawford* is unnecessary for my decision regarding Defendants' motion. Because further briefing on each of these issues is unnecessary, Plaintiff's Motions to File a Sur-Reply (Docs. 74, 75) are **DENIED.**

VII. CONCLUSION

I recommend that Defendants' Motion for Summary Judgment (Doc. 62) be **GRANTED.** Defendants' Objection and Motion to Strike (Doc. 73) is **DENIED as MOOT,** and Plaintiff's Motions for Leave to File Sur-Reply (Docs. 74, 75) are **DENIED.**

IT IS SO ORDERED this 10th day of November, 2008.

s/ Gerrilyn G. Brill
GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JAN 29 2010
OFFICE OF THE CLERK

No. 09-638

IN THE

Supreme Court of the United States

LEROY HILL, JR.,

Petitioner,

v.

EMORY UNIVERSITY, EMORY HEALTHCARE, INC. d/b/a EMORY WINSHIP CANCER INSTITUTE, DEDRA F. CANTRELL A/K/A DEDRA FRUTCHEY AND SANDRA MURDOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether this Court should grant Petitioner a writ of *certiorari* in order to review the Eleventh Circuit's holding that Petitioner failed to establish pretext, in order to address the *prima facie* elements of a race discrimination claim in the context of a reduction-in-force where the courts of appeals are not in conflict on this issue and where the lower courts assumed that Petitioner established a *prima facie* case such that the Court's review would not change the outcome of Petitioner's case?

(2) Whether this Court should grant Petitioner a writ of *certiorari* in order to review the Eleventh Circuit's holding that Petitioner failed to establish that he was subjected to severe and pervasive racial harassment, in order to address what actions by an employer constitute an adverse action, where an adverse action is not an element of a *prima facie* case of racial harassment and where the Eleventh Circuit's holding is not in conflict with a decision of this Court or another court of appeals?

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation of Respondent Emory Healthcare, Inc. and no publicly held company owns shares in the corporation.

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STATEMENT OF THE CASE

Respondents disagree with Petitioner's Statement of the Case because it is factually incorrect, it contains irrelevant material, it contains no cites to the record and it does not set out the facts necessary to consideration of the questions presented. Indeed, Petitioner (who failed to object to any of the District Court's findings of fact or to any portion of the record before the Eleventh Circuit) does nothing more than reiterate the facts that he argued before the lower courts. Rather than correct all of Petitioner's misstatements of the record, Respondents will correct only those facts which bear on the questions presented. Accordingly, Respondents submit the following Statement of the Case:

1. Applicable Law

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") prohibits various employment practices involving discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-2, 2000e-3. 42 U.S.C. § 1981 ("Section 1981") also prohibits discrimination against blacks and other racial minorities in the making and enforcing of contracts. *See* 42 U.S.C. § 1981. A plaintiff alleging disparate treatment, whether under Title VII or Section 1981, bears the ultimate burden of persuading the fact-finder that his treatment was caused by "purposeful or intentional discrimination." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, because it is difficult for the plaintiff to obtain direct evidence of the employer's motive, this Court in *McDonnell*

Douglas Corp. v. Green, articulated a burden-shifting framework of proof that gives the plaintiff the benefit of a presumption operating in his favor. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that burden-shifting framework, a plaintiff must first establish a *prima facie* case; the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment action. Once such a reason has been articulated, any presumption of discrimination raised by the *prima facie* case drops from the case and the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not true, but was a pretext for discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *see also Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).

As this Court has repeatedly recognized, the *prima facie* case method established in *McDonnell Douglas* was never intended to be "rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (*quoting Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335, n. 15 (1977)). Indeed, the ultimate "factual inquiry" in any Title VII case is "whether the defendant intentionally discriminated against the plaintiff. In other words, is the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Constr. Corp.*, 438 U.S. at 577.

This Court expanded the scope of Title VII by recognizing that the prohibition against "discrimination" protects employees from discriminatory sexual harassment and racial harassment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, n. 10 (2002); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-66 (1986). In order to establish a hostile work environment claim based on race, a plaintiff must show that: (1) he belongs to a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment was severe and pervasive; and (5) the employer knew, or should have known, of the harassment and failed to take prompt remedial action. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). In considering the fourth element of the case—whether the harassment was severe and pervasive—this Court has held that the harassment must be "sufficiently severe or pervasive to alter the employee's terms and conditions of employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1996). In determining whether an actionable hostile work environment claim exists, a court will also look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humility, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (*quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). Although the harassment must affect the terms and conditions of a plaintiff's employment in order to be actionable as severe and pervasive harassment, there is absolutely no requirement that a plaintiff prove that he suffered an

adverse employment action in order to sustain a claim of hostile work environment based on race.[1]

2. Facts

Leroy Hill ("Petitioner" or "Hill"), a black male, was hired by Emory Healthcare, Inc. ("EHC") in 1998 as the Director of Data Services and Decisions Support in EHC's Information Services ("IS") Department. (Pet. App. at 16a). Hill reported directly to Dedra Cantrell, the Executive Director of Applications Services, who in turn reported to Ron Palmich, the Chief Information Officer ("CIO"). (*Id.*). In February 2000, Palmich asked Cantrell to assist him in conducting what he called a "pulse check" in the IS department. (*Id.* at 18a). During the pulse check, several employees under Hill's supervision complained to Cantrell about Hill's poor leadership skills. (*Id.*) Around the same time, one of Hill's reports transferred out of the group due to his dissatisfaction with Hill's leadership skills and the fact that working for Hill was like being in the movie "Groundhog Day," where every day is an exact repetition of the day before and nothing is accomplished. (*Id.* at 19a). Effective July 31, 2000, the Human Resources Department and Palmich changed the job titles of several directors who were direct reports of Cantrell to more accurately reflect their roles in the department. (*Id.* at 22a). The "directors" were reclassified as "managers." Hill was one of the directors affected by this change in job title; his title changed from "Director

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[1] Proof of an adverse action, however, is part of a plaintiff's *prima facie* case of retaliation under Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

of Data Services and Decisions Support" to "Manager of Data Applications." This change in job title did not affect Hill's job duties or salary. (*Id.*)

In March 2001, Hill was promoted to the position of Director of Oncology Informatics at the Emory Winship Cancer Institute ("WCI") and received a 10% pay increase. (*Id.* at 22a-23a). Hill's primary role in his new position was project manager for a high-profile informatics project known as GeneSysSI ("GSI"). Administratively, Plaintiff remained an EHC employee and his salary was "charged back" to WCI, meaning that WCI paid Hill's salary while he remained an employee of EHC. (*Id.* at 23a). Hill reported jointly to Cantrell and WCI's Chief Operating Officer, Sandra Murdock. (*Id.*) Following his promotion, Hill's office was relocated to the second floor of the EHC building. (*Id.*) Hill requested office space from WCI but was told that no space was available at that time. (*Id.*) In July 2003, WCI Building C opened, and Hill's peers moved into private offices in that building. (*Id.*) Hill again requested office space from WCI, but his request was denied. (*Id.*) In October 2003, Hill learned of plans to return his office to the fourth floor of the EHC building. (*Id.*) Unhappy with this plan, he complained about his office space situation to the Chief Executive Officer of EHC and the very next day, he received office space in WCI Building B. (*Id.*)

In 2004, GSI moved from its original developmental phase into a maintenance phase, which required less oversight by Hill. (*Id.* at 26a). Also, GSI began to suffer from budget problems as its spending far exceeded its revenue. Due to the budget problems, funding for GSI—

including Hill's salary—was thereafter provided by the Woodruff Fund, Inc. ("Woodruff Fund"), a charitable foundation account. (*Id.*) In the Spring of 2005, Murdock planned the fiscal year 2006 budget, in which she implemented various budget cuts. (*Id.* at 27a). During this process, she considered eliminating Hill's position. (*Id.*) She subsequently discussed the elimination of Hill's position with Cantrell. (*Id.*) Murdock and Cantrell agreed to eliminate Hill's position and, on April 6, 2005, formally requested the personnel action from EHC's Human Resources Department. (*Id.* at 28a) Murdock and Cantrell then scheduled a termination meeting with Plaintiff for May 9, 2005 at 4:30 p.m. and prepared a termination letter to give to him at the meeting. (*Id.*) On May 9, at around 1 p.m., Plaintiff complained of discrimination to an employee in Emory University's Equal Opportunity Programs office. Upon returning to his office, Hill telephoned Murdock to inform her of his complaint. (*Id.*) At 4:30 p.m. on May 9, Murdock and Cantrell met with Hill to inform him of the decision to eliminate his position. (*Id.*)

3. The District Court Proceedings

Following the elimination of his position, Hill filed an action in the United States District Court for District of Northern Georgia, on July 19, 2006, alleging racial discrimination, harassment and retaliation pursuant to Title VII and § 1981. Hill also raised state tort claims for intentional infliction of emotional distress, negligent hiring and negligent retention. On November 10, 2008, the Magistrate Judge issued her Final Report and Recommendation and Order ("R&R") which recommended that the District Court grant summary

judgment in favor of Respondents on all of Hill's claims. Hill subsequently filed objections to the R&R, however, he failed to specifically object to any single fact that was included in the R&R. On December 16, 2008, the District Court correctly denied Hill's objections and adopted the Magistrate Judge's R&R, granting summary judgment to Respondents on all of Hill's claims. In holding that Hill had failed to establish that Respondents' legitimate, non-discriminatory reasons for his job elimination were a pretext for unlawful discrimination or retaliation, the District Court explicitly found that WCI was running a deficit and noted that the "WCI in general and the Woodruff account fund from which Plaintiff's salary was paid were experiencing budget problems at the time of Plaintiff's termination." (Pet. App. 38a). The District Court, which did not dismiss Hill's race claim for failure to state a *prima facie* case, further opined on Hill's failure to establish pretext:

> Because Respondents offer legitimate non-discriminatory reasons for dismissal, namely: (1) that the Genesys SI project was complete and in production support mode; and (2) further Genesys SI expansion across EHC had not been funded; and because none of plaintiff's budgetary measurements show these claims to be pretextual, plaintiff fails to create a genuine issue of material fact concerning his wrongful termination claim.
>
> (Pet. App. at 38a).

The District Court did not hold that Hill failed to establish a *prima facie* case of discrimination. (*Id.*)

Accordingly, the District Court granted summary judgment to Respondents on Hill's discriminatory termination claim based on race, as well as his state law claims and his harassment and retaliation claims under Title VII and § 1981. (*Id.*)

4. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's decision to grant summary judgment to Respondents on all of Hill's claims in a *per curiam* unpublished opinion dated August 25, 2009. Based on Hill's failure to appeal any of the District Court's findings of facts, all of the District Court's factual findings became part of the record on appeal. In reviewing *de novo* the District Court's dismissal of Hill's race and retaliation claims under Title VII and § 1981, the Eleventh Circuit (like the District Court) properly applied the *McDonnell Douglas* burden-shifting framework and found that Hill failed to establish pretext and held:

> Here, the record showed that both WCI and the Woodruff Fund, from which Hill was paid, were running budget deficits; the program that Hill was hired to develop had m o v e d into a maintenance phase that required less of Hill's time and was handled primarily by an outside vendor; and Hill's remaining job duties were shared among lower-earning employees after his termination. Hill did not show that these stated reasons for his termination were pretextual. Therefore, Hill did not establish that the district court erred

> in granting summary judgment to the Respondents on his termination or retaliation claims.
>
> (Pet. App. at 9a).

Notably, in affirming summary judgment in favor of Respondents on Hill's discriminatory termination claim based on race, the Eleventh Circuit did not hold that Hill failed to establish a *prima facie* case and instead assumed that he had made his *prima facie* showing. Indeed, the Eleventh Circuit's Decision (like the District Court's) contains no analysis of Hill's *prima facie* case and only references the elements of a *prima facie* case in its articulation of the burden-shifting framework of *McDonnell Douglas*. (Pet. App. at 6a). Thus, the Eleventh Circuit properly applied the *McDonnell Douglas* framework and dismissed Hill's discrimination claim based on his failure to show pretext and not on his failure to establish a *prima facie* case.

The Eleventh Circuit next affirmed the District Court's decision that Hill failed to establish a claim for hostile work environment based on race. (Pet. App. at 13a). The Court of Appeals expressly rejected Hill's argument that he had established his harassment claim based on his allegation that Respondents subjected him to a handful of isolated, routine employment actions (*i.e.*, the department-wide "pulse check," the change in his job title from Director to Manager, failure to classify him as a regular WCI employee instead of a "chargeback" employee associated with EHC, failure to assign him the office space he desired, *etc.*) which he summarily claimed "clearly met the test of adverse

action, and actionable hostile work environment race discrimination." Specifically, the Court held that these routine personnel actions, "were not so objectively severe or pervasive as to alter the terms and conditions of his employment. Although he may have been subjectively humiliated, Hill's cited actions are objectively neither threatening or humiliating." (Pet. App. at 13a). Although the Court held that none of these routine, facially-neutral personnel actions constituted severe or pervasive harassment which altered the terms and conditions of his employment, it correctly did not address whether any of those actions constituted an adverse action for purposes of deciding Hill's racial harassment claim, since such an inquiry is not part of a plaintiff's *prima facie* case. Accordingly, the Eleventh Circuit concluded that "the district court did not err in granting summary judgment to the Respondents on Hill's hostile work environment claim." (*Id.* at 23a.).

REASONS FOR DENYING THE PETITION

The unpublished decision of the Eleventh Circuit is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Moreover, there is no circuit split regarding the *prima facie* elements of a discriminatory termination claim in the reduction in force ("RIF") context. Further, the Eleventh Circuit affirmed the dismissal of Petitioner's race discrimination claim based on his failure to establish pretext and not on his failure to establish a *prima facie* case. As such, the *prima facie* elements of a discrimination claim in the context of a RIF are not relevant to Petitioner's claims and would not affect the outcome of his case such

that he is improperly seeking an advisory opinion from this Court. Likewise, a purported circuit split regarding what constitutes an adverse action for purposes of a Title VII retaliation claim has no relevance to Hill's hostile work environment claim since it is not an element of his *prima facie* case. For these reasons, further review by this Court is not warranted and the Petition For A Writ of *Certiorari* should be denied.

I. The Purported Split Amongst The Courts Of Appeals Regarding The *Prima Facie* Elements Of A Discriminatory Termination Claim In The Reduction In Force Context Is Not Relevant And Would Not Affect The Outcome of Petitioner's Discrimination Claim Because The Eleventh Circuit Did Not Hold That Petitioner Failed To Establish A *Prima Facie* Case

Petitioner asks this Court to grant his Petition to address a purported split amongst the courts of appeals pertaining to his *prima facie* case, despite the fact that the Eleventh Circuit did not hold that Petitioner failed to establish a *prima facie* case of discriminatory termination based on race. (Pet. App. at 22-23). Indeed, the Eleventh Circuit assumed that Petitioner had established a *prima facie* case and dismissed Petitioner's claim based on its finding that Petitioner failed to establish that Respondents' legitimate, non-discriminatory reasons for his position elimination were a pretext for discrimination (or retaliation). (*Id.* at 9a). Thus, even if this Court were to grant the Petition and agree with Petitioner that there is a split amongst the courts of appeals regarding the *prima facie* elements

in the context of a RIF, such a decision would have no effect whatsoever on Petitioner's case. The Eleventh Circuit's determination—which petitioner neither challenges nor asks this Court to review—that Petitioner failed to show that Respondents' legitimate, nondiscriminatory reasons for his position elimination were a pretext for race discrimination would remain and would continue to support the determination that Respondents are entitled to summary judgment on Petitioner's discrimination (and retaliation) claims.[2] Consequently, even if there was a disagreement among the circuits on the question presented (which there is not), this case is clearly not the appropriate vehicle for considering that question because Petitioner's discrimination claim fails due to his failure to establish pretext. Therefore, because the Eleventh Circuit did not hold that Petitioner had failed to establish a *prima facie* case, review of that decision would be inappropriate in this case and amount to merely an advisory opinion. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not

[2] Although Petitioner summarily asserts in one sentence that "the Eleventh Circuit's conclusion that Hill did not show pretext is in error and should be rejected by this Court" (Pet. App. at 29), this issue is not properly before the Court and even if it were, Petitioner has failed to argue that the Eleventh Circuit's pretext finding is in conflict with a decision of this Court or of another court of appeal. To be sure, Petitioner's mere statement of disagreement with the Eleventh Circuit's decision to dismiss his discrimination and retaliation claims for failing to show pretext is not sufficient to warrant this Court's review.

consider them here."); *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (noting that this Court does "not sit to decide hypothetical issues or to give advisory opinions about issues"). Accordingly, the Petition should be denied.

II. There Is No Split Amongst The Courts Of Appeals Regarding The *Prima Facie* Elements Of A Discriminatory Termination Claim In the Reduction In Force Context

Despite the fact that resolution of the issue would not affect the outcome of his discriminatory termination claim because the Eleventh Circuit did not hold that Petitioner failed to establish a *prima facie* case, Petitioner nonetheless asserts that this Court's review is warranted to resolve a conflict in authority regarding the *prima facie* elements of a discriminatory termination claim in the context of a RIF.[3] (Pet. App. at 22-23). In support of his unfounded argument, Petitioner

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[3] Petitioner also erroneously contends that the Eleventh Circuit required him to produce direct evidence of discrimination, however, even a cursory review of the Eleventh Circuit's well-reasoned decision reveals that it properly applied the *McDonnell Douglas* burden-shifting framework to Petitioner's discrimination and retaliation claims under Title VII and § 1981. (Pet. App. at 6a-9a). Similarly Petitioner's assertion that no plaintiff in the Eleventh Circuit has ever established a *prima facie* case in an action arising from a RIF (Pet. App. at 29) is belied by at least one of the decisions to which he cites. *See Jameson v. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996) (holding that plaintiff established a *prima facie* case with respect to her discrimination claim arising from a RIF but granting summary judgment to employer based on plaintiff's failure to show pretext).

cites several cases (Pet App. 24-28) to suggest that there is a circuit conflict regarding the *prima facie* elements in the context of a RIF. As an initial matter, the decision below is unpublished and it does not establish controlling precedent (Pet. App. at 1a; *see* 11th Cir. R. 36-2), and it therefore does not give rise to the type of conflict in published decisions that would warrant this Court's attention. As such, the Petition should be denied on this basis alone.

The Petition should also be denied because the decision below does not conflict with any of the decisions petitioner cites. First, most of the cases cited by Petitioner are stale and were decided over 20 years ago and address claims other than the type raised by petitioner (claims under the Age Discrimination In Employment Act ("ADEA")), and therefore cannot present a conflict on the question presented here. (Pet. App. at 25-27, n. 7). Second, all of the cited decisions, like the decision below, agree that courts of appeals will apply the *McDonnell Douglas* framework in the absence of direct evidence and that direct evidence of discrimination is not required at the *prima facie* stage. *Compare Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983) (stating that direct evidence is not required to prove a *prima facie* case of discrimination in the context of a RIF), *and Massarky v. Gen. Motors Corp.*, 706 F.2d 111 (3d Cir. 1983) (accepting circumstantial evidence of discrimination at the *prima facie* stage), *with Rowell v. BellSouth Corp.* 433 F.3d 794, 798 (11th Cir. 2005) (noting that the *prima facie* elements in the context of a RIF require a plaintiff to show that he is: (1) within the protected age group, (2) adversely affected, (3) qualified

to assume another position at the time of discharge, and (4) "evidence, *circumstantial or direct*, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.") (*emphasis added*), *and Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1155 (8th Cir. 2007) (noting that a plaintiff in a RIF case may establish *prima facie* case by offering circumstantial evidence that his protected status was a factor in the termination decision), *and Skelton v. Sara Lee Corp.*, 249 Fed.Appx. 450, 457 (6th Cir. 2007) ("[I]n a RIF or reorganization case, the employee "does not make out a *prima facie* case absent direct, *circumstantial*, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.") (*emphasis added*). Moreover, the decisions cited by Petitioner, as well as decisions from the Eleventh Circuit and other circuits are in unanimity that a plaintiff may satisfy his *prima facie* burden by offering circumstantial evidence of intentional discrimination. (*Id.*) Although other courts of appeals have articulated the *prima facie* case in slightly different ways, such a variation does not result in the application of a different or more rigorous standard and is simply an inconsequential variation of the *prima facie* case. Such an inconsequential variation clearly does not constitute a split amongst the courts of appeals and certainly is not a compelling reason warranting *certiorari* review because, as this Court has long held, "the *prima facie* case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of

discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (*quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977)) (The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff. In other words, is the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'").

Even if a slight variation regarding the articulation of the *prima facie* elements did constitute a split amongst the circuits, such a split is not important enough to warrant this Court's review as it only pertains to a plaintiff's exceedingly light burden of establishing a *prima facie* case and does not implicate the court's pretext analysis, which is the ultimate issue in any discrimination case where no direct evidence exists. As such, this purported split would never yield a situation where identical cases were adjudicated with different outcomes because the *prima facie* case has no bearing on a plaintiff's ability to show pretext and is only used to shift the evidentiary burden to Defendant to articulate a legitimate, non-discriminatory reason for its action. Because all of the circuits are in accord regarding the elements necessary for a *prima facie* case of race discrimination in the RIF context, Petitioner has failed to identify a split amongst the circuits and the Petition should be denied.

III. The Purported Split Amongst The Courts Of Appeals Regarding What Constitutes An Adverse Action In The Context Of A Title VII Retaliation Claim Is Not Relevant And Would Not Affect The Outcome of Petitioner's Hostile Work Environment Claim

The Eleventh Circuit properly held that the routine, facially-neutral personnel actions that Petitioner contended supported his racial harassment claim, "were not so objectively severe or pervasive as to alter the terms and conditions of his employment. Although he may have been subjectively humiliated, Hill's cited actions are objectively neither threatening or humiliating." (Pet. App. at 13a). Petitioner nonetheless asserts, however, that this Court's discretionary review is warranted to resolve a conflict in authority on the issue of what constitutes an adverse action for purposes of construing his racial harassment claim, despite the fact that an adverse action is not an element of his harassment claim and the fact that his harassment claim was not dismissed for failure to demonstrate that an adverse action was taken against him. (Pet. App. at 32) In support of this baseless argument, Petitioner cites seven (7) cases, all of which focus on the types of employer actions which can be deemed "adverse actions" within the context of a Title VII retaliation claim. (Pet. App. 32-33). Clearly, Petitioner's argument and the case law upon which he relies demonstrates a fundamental misunderstanding of the necessary elements for a hostile environment claim based on race, which are that: (1) Plaintiff belongs to a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment

affected a term, condition or privilege of employment; and (5) the employer knew, or should have known, of the harassment and failed to take prompt remedial action. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (Pet. App. at 12-13a). Because the definition of an adverse action in the Title VII retaliation is completely irrelevant to Petitioner's harassment claim, even if there were disagreement in the circuits on the question presented, this case is an inappropriate mechanism for considering that question because the Eleventh Circuit affirmed dismissal of Petitioner's harassment claim because he failed to show that he was subjected to severe and pervasive harassment. (Pet. App. at 13a). Thus, the Petition should be denied because resolution of the issue of what constitutes an adverse action in the Title VII retaliation context would not affect the outcome of Petitioner's racial harassment claim and would cause this Court to render a purely advisory opinion. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (noting that this Court does "not sit to decide hypothetical issues or to give advisory opinions about issues. . . .").[4]

IV. The Eleventh Circuit's Decision Dismissing Petitioner's Racial Harassment Claim For Failing To Establish Severe And Pervasive Harassment Is Consistent With Decisions Of This Court And Other Courts Of Appeal

Petitioner summarily contends that the Eleventh Circuit's decision that Petitioner failed to show that he was subjected to severe and pervasive harassment

[4] While Hill raised a retaliation claim in his Complaint, his Petition herein raises no issues regarding that claim.

conflicts with the law of this Court, as well as decisions from other courts of appeal. (Pet. App. at 30). As an initial matter, the decision below is unpublished and it does not establish controlling precedent (Pet. App. at 1a; *see* 11th Cir. R. 36-2), and it therefore does not give rise to the type of conflict in published decisions that would warrant this Court's attention. As such, the Petition should be denied on this basis alone.

The Petition should also be denied because Petitioner has failed to identify any decision from this Court or from any court of appeals which conflicts with the Eleventh Circuit's decision to grant summary judgment to Respondents of Petitioner's racial harassment claim. The unambiguous law of the Eleventh Circuit, which is in harmony with the law of this Court and all other circuits plainly states that in evaluating whether an actionable hostile work environment claim exists, a court looks to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101. 116 (2002) (*quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002); (Pet. App. at 13a). The Eleventh Circuit's decision, as well as the law of this Court and the courts of appeals are also in accord that, in considering whether the alleged harassment was severe and pervasive, that the harassment must be "sufficiently severe or pervasive to alter the employee's terms and conditions of employment and create an abusive working

environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1996); (Pet. App. at 12a-13a).

Notably, Petitioner has not identified any decision from this Court or any court of appeal where a plaintiff successfully demonstrated severe and pervasive racial harassment based on a handful of trivial, facially-neutral personnel actions (*i.e.*, the change in his job title, failure to classify him as a regular WCI employee instead of a "chargeback" employee associated with EHC, failure to assign him the office space he desired, *etc.*). Likewise, as discussed in Section III, *supra*, Petitioner's misplaced reliance on cases examining what constitutes an adverse action in the context of a Title VII retaliation claim bear no relevance to Petitioner's harassment claim and certainly do not demonstrate that the Eleventh Circuit ignored precedent of this Court or rendered a decision which is in conflict with another court of appeal. Petitioner's claim that a split amongst the circuit courts exists regarding the necessary "quantum of proof" is nothing more than a veiled attempt to invoke this Court's jurisdiction where he simply disagrees with the Eleventh Circuit's application of the facts of his case to the established law. Thus, Petitioner has failed to demonstrate that the Eleventh Circuit's well-reasoned decision is in conflict with the law of this Court or with a decision of another court of appeal and the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition For A Writ Of *Certiorari* be denied.

Respectfully submitted,

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